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Nos. 12,597 and 12,607

United States Court of Appeals
For the Ninth Circuit

HARRY RENTON BRIDGES, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeals from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

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JUL 16 1951

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Nos. 12,597 and 12,607

United States Court of Appeals For the Ninth Circuit

HARRY RENTON BRIDGES, et al.,	}
<i>Appellants,</i>	
VS.	
UNITED STATES OF AMERICA,	}
<i>Appellee.</i>	

Upon Appeals from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

INTRODUCTORY STATEMENT.

These are appeals (Tr. 241-244)¹ from judgments of the United States District Court for the Northern District of California (Southern Division) convicting appellants of violating sections of Title 8 and Title 18 of the United States Code, and committing appellants to custody therefor (Tr. 235-240) and from a judgment of the same Court revoking the citizenship of appellant Bridges.

Each appellant is, or has been, an officer of the International Longshoremen's and Warehousemen's Union and each has been active in its affairs. This prosecution arose out of alleged violations of the

¹All references are to the Transcript of Record in Case No. 12597, unless otherwise indicated.

United States Code committed in connection with the naturalization in 1945 of appellant Bridges.

Harry R. Bridges has resided continuously in the United States since 1920, when he entered legally as an immigrant seaman from Australia. (Tr. 43.) He was naturalized on September 17, 1945. (U.S. Ex. 4.) His wife is a native-born American citizen, as are his children. His naturalization was procured after a long series of investigations and proceedings during which the Government and others sought to secure his deportation upon the ground that he was or had been a member of, or that he was or had been affiliated with, the Communist Party of the United States. After a judicial decision adverse to the Government (*Bridges v. Wixon*, 326 U.S. 135 [1945]), Bridges was finally permitted to complete his pending naturalization proceeding.

On June 23, 1945 (five days after the decision of the Supreme Court of the United States in *Bridges v. Wixon*, *supra*), Bridges filed at the San Francisco office of the Immigration and Naturalization Service his application for a certificate of arrival and his preliminary form for a petition for naturalization. (U.S. Ex. 1.) Pursuant to notice thereafter received from the Service, he appeared, on August 8, 1945, before a naturalization examiner, in connection with his naturalization petition. At the same time appellants Schmidt and Robertson also appeared and witnessed the naturalization petition.²

²Appellant Robertson was called in at the last minute to take the place of a prospective witness whose citizenship qualifications were not established to the satisfaction of the examiner. (Tr. 459-461.)

On September 17, 1945, Bridges, with the same two witnesses, appeared in the Superior Court of the State of California, in and for the City and County of San Francisco, Honorable Thomas M. Foley presiding, and testimony was given in support of the petition. The two witnesses gave testimony to the effect that they were American citizens, that they knew appellant for at least five years, and knew him to be a person of good moral character, that they would vouch for his loyalty to the United States, and that they would recommend him to citizenship. (U.S. Ex. 3.)³ Government counsel stated that the witnesses were satisfactory, and they were excused.

Bridges was next examined. The following was one of the many questions put to and answers given by him:

“Q. Do you now or have you ever belonged to the Communist Party in the United States?

A. I have not, I do not.” (U.S. Ex. 3.)

After further examination, Government counsel stated that the Government had no further evidence and that the Government had no objection to the naturalization of appellant. (Tr. 549.) Bridges was thereupon naturalized by the Court.

Thereafter, on May 25, 1949, *three years, eight months*, and *eight days* after the naturalization, an indictment (Tr. 3-8) against Bridges and his two

³It is not alleged in the indictment herein, nor did the Government offer any proof at the trial, that any of these statements were false.

witnesses was filed in the Court below, charging substantially as follows:

(Count 1) That appellants violated 18 U.S.C. 371 (formerly 18 U.S.C. 88) by conspiring to defraud the United States by impairing, obstructing, and defeating the proper administration of its naturalization laws, by having Bridges fraudulently petition for and obtain the aforesaid naturalization. The fraud allegedly consisted of the fact that Bridges' statement that he did not belong to and had never belonged to the Communist Party in the United States was false since he allegedly did belong to the Communist Party and had been a member thereof from 1933 to September 17, 1945.

The following overt acts were alleged to have been committed in pursuance of the alleged conspiracy: (a) the filing on June 23, 1945, by Bridges, of his application for a certificate of arrival and his preliminary form for petition for naturalization; (b) the appearance on August 8, 1945, by Bridges, before the naturalization examiner; (c) the appearance on August 8, 1945, by Schmidt and Robertson, before the naturalization examiner and their witnessing of the naturalization petition; and (d) the appearance on September 17, 1945, by appellants, before Judge Foley and the giving of testimony in support of the petition for naturalization.

(Count 2) That Bridges violated 18 U.S.C. §1015(a)⁴ (formerly 8 U.S.C. 746[a][1]⁵) in that on

⁴Mis-cited in the indictment as 18 U.S.C. 1015(1).

⁵Mis-cited in the indictment as 8 U.S.C. §746(1).

September 17, 1945, in the naturalization proceeding before Judge Foley, he made a false statement under oath by answering as aforesaid. It was alleged that the question put to appellant was material and the falsehood was willful.

(Count 3) That Schmidt and Robertson violated the old 8 U.S.C. §746(a)(5)⁶ in that they encouraged, aided, advised, and assisted Bridges to obtain, receive and accept a fraudulently obtained certificate of naturalization.

After the indictment was returned by the Grand Jury, Bridges moved its dismissal (Tr. 10-26) on the grounds, *inter alia*, that the prosecution was outlawed by the statute of limitations; that the indictment did not state facts sufficient to constitute an offense against the United States; that there was a fatally defective lack of particularity with respect to certain allegations; that the prosecution in the face of the prior adjudications⁷ constituted placing him twice in jeopardy contrary to the provisions of the Fifth Amendment to the Constitution of the United States; that the said prior adjudications were *res judicata* of the issues raised by the indictment; that the prosecution, in the face of the prior adjudications, was a deprivation of his life, liberty or property without due proc-

⁶Mis-cited in the indictment as 8 U.S.C. §746(5).

⁷The facts with respect to these adjudications were called to the trial Court's attention by affidavits (Tr. 42-70) filed in support of the motions pursuant to the provisions of Rule 47, *Rules of Criminal Procedure for the United States District Courts*. The facts set forth in these affidavits were not denied by the Government.

ess of law, contrary to the provisions of the Fifth Amendment; that this proceeding, by singling him out for prosecution, in view of the facts shown by the affidavits filed, was a deprivation of his life, liberty or property without due process of law, contrary to the provisions of the Fifth Amendment; that the prosecution, having been instituted not in good faith for the purpose of enforcing the penal or any other laws of the United States, but for other and different purposes and motives,⁸ was a deprivation of his life, liberty or property without due process of law, contrary to the provisions of the Fifth Amendment; that the prosecution, being an attempt to punish him for the expression of his views on political, social and economic matters and for his associations, was an infringement of the rights guaranteed to him under the First Amendment to the Constitution; that in view of the decision in *Schneiderman v. United States*, 320 U.S. 118 (1943), and other cases, the question, the answer to which was the basis of the prosecution, was immaterial in the naturalization proceeding.

Appellants Schmidt and Robertson filed substantially similar motions to dismiss on those of the foregoing grounds which were applicable to them. (Tr. 27-41, 8312.)

The motions to dismiss were all denied (*United States v. Bridges*, 86 F.Supp. 922 [N.D.Calif., 1949].).

⁸Affidavits in support of these contentions (Tr. 73-75, 146) were also submitted to the trial Court under Rule 47, *supra*, and the material allegations thereof likewise were not denied by the Government.

Thereafter, and commencing on November 14, 1949, the trial of appellants was commenced before a jury in the Court below. With only occasional interruptions the trial ran continuously from April 4, 1950, on which date the jury returned a verdict of guilty against Bridges on Counts 1 and 2 of the indictment, and a verdict of guilty against Schmidt and Robertson on Counts 1 and 3 of the indictment. That is, a verdict of guilty against all appellants was returned on all counts of the indictment. (Tr. 220-222.)

Motions in arrest of judgment and for new trials on behalf of each of the appellants were duly made. (Tr. 223-228.) All were denied (Tr. 229), and Bridges was, on April 10, 1950, sentenced to prison for two years on the first count of the indictment and five years on the second, said sentences to run concurrently. (Tr. 230, 235-236.) Schmidt and Robertson were each sentenced to two years imprisonment on Counts 1 and 3 of the indictment, said sentences to run concurrently. (Tr. 231-234, 237-240.) Notices of appeal to this Court were thereupon duly filed for each appellant. (Tr. 241-244.) At the time sentence was pronounced the trial Court, with the acquiescence of the Government, released appellants on bail pending their appeals. (Tr. 8041, *et seq.*; 8154, *et seq.*)

On June 16, 1950, upon motion made by the Government (Tr. 8162) and over the opposition of appellant Bridges (Tr. 8164) and purportedly acting upon the authority of 8 U.S.C.A. 738(e), the trial Court signed and filed a memorandum opinion and order declaring the citizenship of appellant Bridges revoked

and directing the Government to present an appropriate decree. (Tr. 3-7 of 12607.) (*United States v. Bridges*, 90 F.Supp. 973 [N.D.Calif., 1950].) On June 20, 1950, the trial Court signed and filed a "Decree Revoking, Setting Aside and Declaring Void the Final Order Admitting Defendant Harry Renton Bridges to Citizenship". (Tr. 8-12 of 12607.) Notices of appeal from the foregoing order and decree were immediately filed by appellant Bridges. (Tr. 7-8, 12-13 of 12607.)

The appeals taken from the order and decree revoking Bridges' citizenship were consolidated by stipulation with the appeal taken earlier from the order and judgment of imprisonment. (Tr. 16-17 of 12607.)

On July 31, 1951, the Government filed a motion with the trial Court for an order to revoke the order granting bail to appellant Bridges and to remand him to the custody of the Marshal. Over appellant's objection and despite the admission by the Government that the appeal here pending presented substantial questions for review, such an order was made by the trial Court on August 5, 1950, and Bridges was incarcerated in the San Francisco County Jail until released by the mandate of this Court on August 25, 1950. (*Bridges v. United States*, 184 F.2d 881 [9 Cir., 1950].)

During the course of the trial, error prejudicial to appellants was committed by the Court. This error consisted, *inter alia*, of the admission of evidence offered by the Government; the rejection of evidence offered by the appellant; misconduct of Government

counsel; misconduct of the trial Court; instructions given at the request of Government counsel or by the Court of its own motion; and the refusal to give instructions requested by appellant.

The trial itself, by virtue of the foregoing matters, was not a fair trial and the appellants were thereby deprived of the due process of law guaranteed to them by the Fifth Amendment.

The trial Court erred in revoking appellant's citizenship, for the reasons, *inter alia*, that it had no jurisdiction to make such an order because of the fact that the case already was on appeal before this Court by virtue of the filing of timely notices of appeal; that appellant's conviction was not final; that appellant was not convicted under any chapter of the Nationality Code; and that appellant was neither charged with nor convicted of knowingly procuring naturalization in violation of law.

JURISDICTION.

Jurisdiction of the District Court over the alleged offenses is conferred by 18 U.S.C. 3231. Jurisdiction of the Court of Appeals to hear and determine this appeal is conferred by 28 U.S.C. 1291.

STATUTES INVOLVED.

18 U.S.C. 371, upon which the first count of the indictment was based, reads, so far as is relevant to this proceeding as follows:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined * * * or imprisoned.”

18 U.S.C. 1015(1), upon which the second count of the indictment was based reads, so far as is relevant to this proceeding, as follows:

“Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens * * * shall be fined * * * or imprisoned * * *”

8 U.S.C. §746(a)(5), upon which the third count of the indictment was apparently based, read, before its repeal,⁹ so far as is relevant to this proceeding, as follows:

“It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise * * *

“(5) To encourage, aid, advise, or assist any person not entitled thereto to obtain, accept, or receive any * * * certificate of naturalization, or certificate of citizenship, or other documentary evidence of naturalization or of citizenship—

a. Knowing the same to have been procured by fraud; or

⁹This statute was repealed June 25, 1948, effective September 1, 1948, by C. 645, §21, 62 Stat. 862.

- b. Knowing the same to have been procured by the use or means of any false name or false statement given or made with intent to procure the issuance of such * * * certificate of naturalization, or certificate of citizenship, or other documentary evidence of naturalization or citizenship * * *
-

The applicable statute of limitations is to be found in 18 U.S.C.A. 3282, and reads *in toto* as follows:

“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.”

The statute of limitations which was found in the Nationality Code prior to its repeal on June 25, 1948,¹⁰ is found in 8 U.S.C.A. 746(g), and reads *in toto* as follows:

“No person shall be prosecuted, tried, or punished for any crime arising under the provisions of this chapter unless the indictment is found or the information is filed within five years next after the commission of such crime.”

Section 21 of the Act of June 25, 1948,¹¹ repealing the foregoing section, reads *in toto* as follows:

“The sections or parts thereof of the Revised Statutes or Statutes at Large enumerated in the

¹⁰See note 9, *supra*.

¹¹62 Stat. 83.

following schedule are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal.”

The so-called Wartime Suspension statute, 18 U.S.C.A. 3287, relied on by the Government and cited by the trial Court, reads *in toto* as follows:

“When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

“Definitions of terms used in section 103 of Title 41 shall apply to similar terms used in this section.”

8 U.S.C.A. 738(e) upon which the revocation of Bridges' citizenship was purportedly based, reads *in toto* as follows:

“When a person shall be convicted under this chapter of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication.”

QUESTIONS PRESENTED.

1. Whether the prosecution of appellants was barred by the operation of the statute of limitations.
2. Whether the so-called Wartime Suspension statute—18 U.S.C.A. 3287—is applicable to this proceeding.
3. Whether the so-called “savings clause”—§ 21 of the Act of June 25, 1948—is applicable to this proceeding.
4. Whether the indictment and each count thereof stated facts sufficient to constitute an offense against the United States.
5. Whether the indictment and each count thereof stated such facts with sufficient particularity.
6. Whether the question propounded to Bridges in the naturalization proceeding, the answer to which is the basis for this action, was material to that proceeding.

7. Whether, in view of the prior adjudications, this proceeding placed Bridges in double jeopardy of his life and limb for the same offense, contrary to the provisions of the Fifth Amendment.

8. Whether, in view of the prior adjudications, this proceeding deprived Bridges of life, liberty or property without due process of law, contrary to the provisions of the Fifth Amendment.

9. Whether, in view of the prior adjudications, the doctrine of *res judicata* was applicable to this proceeding.

10. Whether the trial Court erred in denying appellants' motions to dismiss the indictment and each count thereof by virtue of the questions presented by the foregoing.

11. Whether in its rulings with respect to the inclusion of evidence proffered by the Government and the exclusion of evidence proffered by appellants, the trial Court committed error prejudicial to appellants.

12. Whether in its conduct of the trial, the trial Court committed error prejudicial to appellants.

13. Whether counsel for the Government, during the course of the trial, made statements and engaged in conduct prejudicial to appellants.

14. Whether the trial Court committed error prejudicial to appellants by rejecting appellants' plea of *res judicata* and permitting the introduction of evidence concerning matters already the subject of ad-

judication between appellant Bridges and the Government of the United States.¹²

15. Whether the trial Court committed error prejudicial to appellants by refusing to permit the submission to the jury of evidence concerning the prior deportation proceedings and the decision of the Supreme Court of the United States in *Bridges v. Wixon*, 326 U.S. 135 (1945).

16. Whether the trial Court committed error prejudicial to appellants in its instructions to the jury, particularly with respect to the doctrine of reasonable doubt, with respect to the alleged materiality of the question propounded to appellant Bridges in the naturalization proceeding, and with respect to the doctrine of *res judicata*.

17. Whether the trial Court had jurisdiction to make and enter any opinion, decree or order revoking the citizenship of appellant Bridges in view of the fact that notices of appeal from the judgment of imprisonment had already been filed.

18. Whether the trial Court erred in making its opinion, order and decree revoking Bridges' citizen-

¹²Originally, by appropriate motion to dismiss before trial, the defense of *res judicata* to the entire proceeding was raised. The motion to dismiss was denied. (*United States v. Bridges*, 86 F. Supp. 922 [N.D. Calif., 1949].) During the trial timely objections to the introduction of any evidence touching on alleged incidents within the periods embraced in the prior adjudications were made. These objections were overruled. (*United States v. Bridges*, 87 F. Supp. 14 [N.D. Calif., 1949].) Appellants also proposed instructions to the jury which would have directed it to disregard evidence touching on alleged incidents within the periods embraced in the prior adjudications. These instructions were not given by the trial Court. (Tr. 293-296.)

ship despite the fact that his conviction was not yet final because of the pendency of the appeal to this Court.

19. Whether the trial Court erred in making its opinion, order and decree revoking Bridges' citizenship despite the fact that he had not been convicted under any chapter of the Nationality Code as required by 8 U.S.C.A. 738(e).

20. Whether the trial Court erred in making its opinion, order and decree revoking Bridges' citizenship despite the fact that he had not been convicted of knowingly procuring naturalization in violation of law as required by 8 U.S.C.A. 738(e).

SPECIFICATION OF ERRORS.

1. The Court below erred in not holding that the prosecution was barred by the operation of the statute of limitations.

2. The Court below erred in holding that the so-called Wartime Suspension statute—18 U.S.C.A. 3287—was applicable to this proceeding.

3. The Court below erred in holding that the so-called "savings clause"—§ 21 of the Act of June 25, 1948—was applicable to this proceeding.

4. The Court below erred in holding that the indictment and each count thereof stated facts sufficient to constitute an offense against the United States.

5. The Court below erred in holding that the indictment and each count thereof stated such facts with sufficient particularity.

6. The Court below erred in holding that the question propounded to appellant Bridges in the naturalization proceeding, the answer to which is the basis for this prosecution, was material to that proceeding.

7. The Court below erred in holding that despite the prior adjudications this proceeding did not constitute placing appellant Bridges in double jeopardy of his life and limb for the same offense contrary to the provisions of the Fifth Amendment.

8. The Court below erred in holding that despite the prior adjudications this proceeding did not constitute a deprivation of appellant Bridges' life, liberty or property without due process of law, contrary to the provisions of the Fifth Amendment.

9. The Court below erred in holding that despite the prior adjudications, the doctrine of *res judicata* was not applicable to this proceeding.

10. The Court below erred in its ruling with respect to the exclusion of evidence proffered by appellants:

(a) The trial Court erred in rejecting appellants' offer of the decision of the Supreme Court of the United States in the case of *Bridges v. Wixon, supra*, during the course of the testimony of the witnesses Garner, Schmidt and Robertson.

The grounds urged at the trial for the admission of this evidence were:

(1) In the case of the witness Garner, to explain his prior testimony that he had read and was familiar with the decision, and further to demonstrate the extent of his knowledge at the time of his examination, particularly of the appellants Schmidt and Robertson, in the 1945 naturalization proceeding in order to test the credibility of his prior testimony that he had put certain questions to said appellants in those proceedings. (Tr. 526-527, 610.)

(2) In the case of the witnesses Robertson and Schmidt, to demonstrate the basis of their defense that they believed in good faith that appellant Bridges was entitled to citizenship and was not a member of the Communist Party. (Tr. 4226, 4248, *et seq.*, 4617-4619.)

(b) The trial Court erred in rejecting appellants' offer of the findings and conclusions of Dean James M. Landis during the course of the examination of the witness Garner.

The grounds urged at the trial for the admission of this evidence were to explain the witness Garner's prior testimony that he had read and was familiar with those findings, and to ascertain whether those findings had any bearing on his actions in the naturalization proceedings, and to test the credibility of his prior testimony that he had put certain questions to appellants Schmidt and Robertson during the 1945 naturalization proceedings. (Tr. 599-610.)

11. The Court below erred in rejecting appellant's plea of *res judicata* and permitting the introduction

of evidence concerning matters already the subject of adjudication between appellant and the Government.

12. The Court below erred by refusing to permit to be submitted to the jury evidence concerning the prior adjudications between appellant Bridges and the Government, and particularly the decision of the Supreme Court of the United States in *Bridges v. Wixon*, *supra*.

13. The trial Court erred in giving the following instructions:

(a) In the issue of Mr. Bridges' asserted membership in the Communist Party, eleven witnesses have testified for the government: Messrs. Schomaker, Schrimpf, Hancock, Mrs. Harris, Mr. Krolek, Johnson, Crouch, Ross, Michener, Wilson and Rathborne. As opposed to the foregoing witnesses concerning the alleged membership in the Communist Party, Mr. Bridges, as well as the other defendants, the defendants have offered two witnesses other than themselves, that is, Bruce B. Jones and Mrs. Jean Murray. These, apart from the character witnesses offered by the defense. (Tr. 7864-7865.)

At the trial it was urged that this instruction imposed an unreasonable burden on the appellants and was contrary to the law that the quality and not the quantity of the evidence is determinative of the issue.

(b) Allusions have been made by the defense to certain irrelevant and immaterial matters concerning the Immigration Department and its procedures and operations regarding matters, things

and events other than the investigation and the prosecution of the case at bar. Many of such matters were sought to be elicited by the defense in questions asked and propounded, to which objections were properly sustained by the Court or motions to strike granted with respect to the purported questions. In view of the Court's action with regard to the same, you must ignore the contents of such question or questions and the implication or implications contained therein. This rule applies generally and equally to all questions to which objections have been sustained or motions to strike granted. You are not permitted to conjecture or surmise what the answer or answers might have been if the Court had not sustained the objections or the motions to strike. In short, the matter of ruling on all such procedural matters rests solely with the Court. That is exclusively my province and you are bound by the Court's rulings on such matters. (Tr. 7867-7868.)

It was urged that this took away from the jury determinations arising from questions concerning the previous proceedings as they affected the credibility of witnesses produced by the government. (Tr. 7909.)

(c) During the course of the trial, there have been various and repeated references made to the opinion of the Supreme Court in the case of *Bridges v. Wixon*. I have repeatedly held and rendered written opinions herein that the decision of the Supreme Court is not determinative of any legal or factual issue in the case at bar, and accordingly, I advise and instruct you. You are not to draw any inference or inferences with respect to the objections which I have sustained

and the offer on the part of the defense to place the decision before you or to have its contents read to you. The admissibility of the opinion is a question of law for the Court. Members of the jury are bound by my determination. (Tr. 7868.)

This instruction was error because it ignored the doctrine of *res judicata*. (Tr. 7909-7910.)

(d) There are certain well-defined rules which apply as to how you shall weigh and consider testimony. Many of them are such as these: First, you have the right to observe the witness upon the stand and to consider the impression he or she may make upon you with respect to telling the truth or telling a falsehood. You have a right to observe his or her demeanor, his attitude, whether he appears conscientiously to be stating to the best of his ability the truth, or whether he appears to be suppressing something or coloring his testimony in a manner not to reveal the truth. If the witness has the appearance of attempting to the best of his ability to tell the truth, and other circumstances tend to establish that situation, then you give full credit to his testimony. But if you are impressed that the witness is attempting to hide something or is not telling the whole truth, then you have the right to give only such consideration to his testimony as you may think it entitled to receive. (Tr. 7869.)

This instruction was error because it disregarded ordinary rules for determining credibility. (Tr. 7911-7912.)

(e) If you should find that there are discrepancies or inconsistencies existing in the testimony

of any witness or between the testimony of any witnesses, or if you should find yourself disagreeing over various issues, real or apparent, you should then ascertain whether or not such discrepancies or inconsistencies or such points of difference affect the true issue in this case. Examine such discrepancies or inconsistencies and such disputed points and ask yourselves these questions: How does the decision of this or that or the other discrepancy or other matter in dispute affect the guilt or innocence of the defendants? Regardless of what may be the truth concerning such discrepancies or inconsistencies, ask yourselves the main question: Did or did not the defendants commit that charges or acts as alleged in the indictment? Is such discrepancy or such disputed point material to establish the main and material issue of fact as to the guilt or innocence of the defendants? If they are not material, if the decision of the same is not necessary to enable you to arrive at the guilt or innocence of the defendants, then such discrepancy or disputed points are immaterial and minor matters, and you should waste no further time in discussing or considering them. (Tr. 7872-7873.)

This instruction was error on the ground that it disregarded ordinary rules for determining credibility. (Tr. 7911-7912.)

(f) You should look to the interest which the respective witnesses have in the trial or in its results. Where the witness or witnesses has or have a direct personal interest in the result of the trial, the temptation is strong to color, pervert or withhold the facts. The law permits the defendant at

his own request to testify in his own behalf. The defendants have availed themselves of this privilege. Their testimony is before you and you must determine how far it is credible. The deep personal interest which they have in the result of the trial should be considered by the jury in weighing their evidence in determining how far or to what extent it is worthy of credit. The fact that one is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. (Tr. 7874.)

This instruction was error because it subjected the testimony of the appellants to an unfairly critical examination in the light of the entire record. (Tr. 7913.)

(g) Prior deportation proceedings against Mr. Harry Bridges, held before the Bureau of Immigration Examiners, are in no way in issue in this case, nor are any court decisions which have been frequently mentioned relevant issues in this trial. (Tr. 7877.)

This was objected to as depriving appellants of the benefits of the doctrine of *res judicata*. (Tr. 7909-7910.)

(h) The motive of the prosecution is not relevant to the ordinary criminal proceeding; the material questions ordinarily are whether the defendant has committed the act or acts alleged and whether the act or acts constitute a crime. In the instant case, the basic crime charged against the defendant, Mr. Bridges, is that of false swear-

ing. Though a defendant in a criminal case may show by proper evidence the hostility, bias or interest of any witness, the motive of the prosecution in instituting the present criminal action is immaterial unless you believe that such alleged motive constitutes evidence establishing the innocence or guilt of the accused, or the defendants on trial. (Tr. 7878.)

This was objected to as contrary to the evidence and the law. (Tr. 7916.)

(i) The third count or charge in substance alleges a concert of action as to the two defendants, Henry Schmidt and J. R. Robertson, in that they aided and abetted the defendant, Bridges, in obtaining citizenship fraudulently by reason of false testimony offered. The charge in substance is as follows: On September 17, 1945, the defendants, Henry Schmidt and J. R. Robertson, assisted Harry Renton Bridges to obtain a Certificate of Naturalization by fraudulent means in a naturalization proceeding before the Superior Court of the State of California at a time when the defendants knew that Harry Renton Bridges had been and was a member of the Communist Party in the United States from 1933 up to and including September 17, 1945. Such fraud consisted in giving false statements and making false representations before the Superior Court with respect to Harry Renton Bridges' membership or alleged membership in the Communist Party during the period in question. (Tr. 7880-7881.)

This instruction was error because it misstated the law. (Tr. 7911.)

(j) The term reasonable doubt means a doubt for which a good reason can be given, in the light of all the evidence. It means a doubt which is substantial and not merely shadowy. It does not mean a doubt which is merely capricious or speculative. Neither does it mean a doubt born of reluctance on the part of a juror to perform an unpleasant duty, or a doubt arising out of sympathy for a defendant or out of anything other than a candid consideration of all the evidence presented.

Without its being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions that are given to you.

Remember that the defendant or defendants are entitled to any reasonable doubt, as defined, that you may have in your minds; but at the same time also remember that if you have no such doubt, the government is entitled to a verdict. (Tr. 7885-7886.)

This instruction misstated the law. (Tr. 7914.)

(k) As concerns the defense offered on behalf of the defendants Schmidt and Robertson, the crucial question is whether or not there was any intent upon the part of either of these defendants to deceive and defraud the Government of the United States.

The asserted good faith, the intent, the purpose and motive of what was done by the defendants Schmidt and Robertson constitute the vital and important element of the case brought against them. Hence the jury may consider any material

explanation of their motives and purposes in determining the character of their participation in the citizenship hearing of the defendant Harry Bridges. (Tr. 7887.)

This instruction misstated the law. (Tr. 7914.)

(1) On the question of materiality of the alleged false testimony, however, I further charge you that it is my duty, as the trial judge, to determine whether or not the alleged false testimony was material testimony in the naturalization proceeding before Judge Foley. I charge you, therefore, that if you find that Harry Bridges gave the answers as alleged in the indictment, then such answers were material answers in the naturalization proceeding.

To state it more briefly, whether or not the alleged false testimony was given in the circumstances alleged is a fact question for you to decide. Whether or not the alleged false testimony was material testimony is a law question for the Court to decide. I charge you that the alleged false testimony was material, and that if you find the false testimony was given as alleged, you are not to concern yourselves further with the question of materiality of the testimony. (Tr. 7895.)

This instruction misstated the law with respect to the materiality of the question. (Tr. 7915.)

(m) The defendants, Schmidt and Robertson, have been charged in the third count of the indictment with aiding and abetting the defendant, Bridges, to obtain his citizenship by fraudulent statements and representations pertaining to his alleged membership in the Communist Party. So

that you may understand the meaning of the charge in this count, I shall attempt to explain the legal scope and significance of the term, "to aid or abet."

For one person to abet another person in the commission of a criminal offense, it simply means knowingly and with criminal intent to aid, promote, encourage or instigate, by act or counsel, or both act and counsel, the commission of such criminal offense. (Tr. 7897.)

This instruction misstated the law. (Tr. 7914.)

(n) Expressed in another way, a conspiracy is an unlawful agreement entered into by two or more persons to commit a crime against the United States or to defraud the United States. To sustain a charge of conspiracy, it must be shown that one of the members of the conspiracy did some act commonly called an overt act, in furtherance of the object of the conspiracy. The overt act need not be criminal in nature if considered separately and apart from the conspiracy; it may be as innocent as the act of a man walking across the street or driving an automobile or using a telephone. But, if during the existence of the conspiracy, the overt act is done by one of the conspirators to effect the object of the conspiracy, the crime is complete and it is complete as to every party found by you to be a member of the conspiracy, no matter which one of the parties did the overt act. (Tr. 7898.)

This instruction misstated the law. (Tr. 7914.)

(o) In order to find the existence of a conspiracy, it is not necessary that you find that all

these defendants met together and formed an express agreement, for probably when men enter into a plan of the character here charged, they do not expressly agree. Much, probably, is left to unexpressed understanding and it is not necessary that there should have been any time at which all met and with any formal expression of words agreed upon a plan or a conspiracy. They are usually entered into more or less secretly and carried out in a manner so as to leave as little proof or evidence for detection by anyone later. Rarely in conspiracies is there direct proof of the purposes and intentions of the parties; but direct proof is not indispensable. The object of a conspiracy and a defendant's connection with it may be partly or entirely revealed as shown by the facts and circumstances and the reasonable inferences and conclusions to be drawn from them. But every fact and every circumstance from which the inference is drawn and a conclusion based must be proved beyond a reasonable doubt. (Tr. 7899.)

This instruction misstated the law. (Tr. 7914.)

(p) I think I should further charge you that all persons working together in the furtherance of a common design are members of the conspiracy, although the part any one is to take is subordinate, or is to be executed at a remote distance. It is not necessary that each conspirator participate in each step or stage of the common, general design. One of them may do one thing, another may do a different thing. Some may take major parts, while the participation of others may be in a minor degree. The mere knowledge,

acquiescence or approval of an unlawful act, with cooperation or agreement to cooperate, is not sufficient to constitute one a party to a conspiracy. It requires more than proof of a mere passive cognizance of a crime on the part of a defendant to sustain a charge of conspiracy to commit it. And you must find that the defendant did some act or made some agreement showing an intention to participate in some way in such conspiracy. (Tr. 7900-7901.)

This instruction misstated the law. (Tr. 7914.)

14. The trial Court committed error in refusing to give the following instructions requested by appellants:

a. Defendants' Proposed Instruction No. 2.

The Court advises the jury to find the defendants Henry Schmidt and J. R. Robertson Not Guilty.

This advice of the Court in respect to your deliberations upon the defendants Schmidt and Robertson is based upon the opinion of the Court to the end that there does not exist in the record of this case sufficient evidence to support a verdict of conviction against either of the defendants Henry Schmidt or J. R. Robertson.

Hence the Court advises you to return a verdict of Not Guilty in favor of the defendants Schmidt and Robertson. (Tr. 245.)

It was urged at the trial that the evidence and the law required this instruction. (Tr. 7616.)

b. Defendants' Proposed Instructions Nos. 18, 19 and 23.

No. 18: The credibility of a witness may be impeached by the ascertainment not only of the fact that such witness is interested in the prosecution or biased against the defendants but also by showing of the degree of such interest or bias in order that the jury may measure the depth and violence of his prejudice. (Tr. 250.)

No. 19: A witness for the prosecution in a criminal case may also be impeached by showing that such witness assisted in the preparation of the prosecution's case in order to show an unfair desire on the part of such witness to procure a conviction. (Tr. 251.)

No. 23: The jury has the right, and even the duty to compare the testimony of any witness as to the details given concerning events of the past with the lack of ability of such witness to offer details of incidents of equal importance occurring almost contemporaneously with his appearance in court.

If there is such a difference in the purported abilities of the witness, his testimony in such instances should be viewed with caution. (Tr. 254.)

These instructions stated the ordinary rules respecting the credibility of witnesses. (Tr. 7917.)

c. Defendants' Proposed Instructions Nos. 32 and 33.

No. 32: The witness, Lloyd H. Garner, an officer of the Immigration and Naturalization Service of the United States, testified, among other things, that he had certain oral interviews with

the defendant Henry Schmidt and with the defendant J. R. Robertson, respectively, during the course of which interviews he asked each of said defendants whether or not they had ever belonged to the Communist Party of the United States; he stated that each of said defendants answered this question in the negative.

The defendants Schmidt and Robertson have denied that they were ever members of the Communist Party and they have also denied that any such oral conversation with the witness Lloyd H. Garner ever took place.

In connection with the evidence outlined above, you are instructed that Rule 150.1(c) of the regulations of the Immigration and Naturalization Service provides as follows:

“All statements secured from the alien or any other person during the investigation which are to be used as evidence, should be taken down in writing; and the investigating officer shall ask the person interrogated to sign the statement
* * *”

You are advised that you may consider the applicability of the foregoing rule of the regulations of our Immigration and Naturalization Service in connection with your deliberations upon the truth or falsity of the statements thus made by the witness Lloyd H. Garner. (Tr. 258-259.)

No. 33: The Government does not contend that the defendants Schmidt and Robertson made any statement before the Superior Court of the State of California at San Francisco in the citizenship hearing of Harry Bridges concerning the issue of whether or not Bridges had ever been a member of the Communist Party. The Government does

contend, however, that, in an alleged oral interview had between the witness Lloyd H. Garner and the defendants Schmidt and Robertson, respectively, they were asked by Garner whether or not Harry Bridges was a member of the Communist Party and that they replied in the negative.

In connection with the foregoing state of evidence as well as with all evidence concerning the alleged oral interview between the witness Lloyd H. Garner and the defendants in this case, you are instructed that evidence as to alleged oral statements or admissions attributed to any of the defendants must be viewed by you with caution. (Tr. 459-460.)

These instructions were required as a matter of law in view of the evidence in the case. (Tr. 7917-7918.)

d. Defendants' Proposed Instruction No. 40.

I instruct you that a conspiracy to obtain that to which one is legally entitled is not punishable as a conspiracy to defraud the United States.

In other words, if the defendant Harry Renton Bridges was entitled to become a citizen of the United States under our laws, no conspiracy to assist him in the obtaining of his citizenship could ever be punishable as a crime. (Tr. 263.)

This instruction correctly states the law. (Tr. 7918.)

e. Defendants' Proposed Instructions Nos. 43-48, inclusive, and No. 50.

No. 43: The defendants Schmidt and Robertson are charged, in substance, with unlawfully and fraudulently conspiring to defeat the laws of

the United States by aiding Harry Bridges in his application for citizenship.

Of course, if Harry Bridges was lawfully entitled to obtain his citizenship in the United States, then no crime could have been committed by any person who aided him in the effectuation of this desire.

But one of the questions to be resolved by the jury in relation to the conduct of the defendants Schmidt and Robertson, who appeared as witnesses for the defendant Bridges upon his citizenship petition, is this:

What was the basis for the statements given by the defendants Schmidt and Robertson before the Superior Court of the State of California at San Francisco? Were the statements then and there made by the defendants Schmidt and Robertson made with reasonable reliance upon information, public or otherwise, which they then and there possessed concerning the defendant Harry Bridges?

If the jury finds that the defendants Schmidt and Robertson reasonably relied upon information of a public nature concerning the defendant Harry Bridges and that they based their testimony in the citizenship hearing of Bridges upon their reliance in the verity of such information, then they cannot be found guilty of any act of fraud, and it will become the duty of the jury to find defendants Schmidt and Robertson Not Guilty. (Tr. 264-265.)

No. 44: In support of the charges brought against them by the prosecution, the defendants Schmidt and Robertson are accused of giving the following testimony before the Superior Court

of the State of California at San Francisco in support of the petition by the defendant Harry Bridges for citizenship:

"The witnesses are both citizens of the United States?"

Answers: "Mr. Robertson: Yes." "Mr. Schmidt: Yes."

Question by you: "You each have known the petitioner for the last five years or longer?"

"Mr. Robertson: Yes." "Mr. Schmidt: Yes."

By you: "And you know him to be a resident of this country at this time?"

"Mr. Robertson: Yes." "Mr. Schmidt: Yes."

By you: "Do you each vouch for his loyalty to the United States?"

"Mr. Robertson: Yes." "Mr. Schmidt: Yes."

Your question: "Do you recommend him as a person of good moral character?"

"Mr. Robertson: Yes." "Mr. Schmidt: Yes."

"Do you recommend him to this court for citizenship?"

"Mr. Robertson: I do." "Mr. Schmidt: I do."

The defendants Schmidt and Robertson admit that they gave such testimony.

In uttering the statements, observations and/or recommendations just now read, the defendants Schmidt and Robertson were entitled to rely, not only upon such independent knowledge as each may have possessed concerning the life of Harry Bridges but they were entitled further to

base such reliance upon any public documents discussing the involved subject matter, including the opinion of the Supreme Court of the United States in the previous cause in which the deportation of the defendant Harry Bridges was attempted.

Under our law, the intent to defraud is of the essence of any alleged criminal scheme or artifice. If such essence be lacking, there is no such scheme or artifice, and hence no crime.

Hence if the defendants Schmidt and Robertson placed a reasonable reliance in the verity of the statements of the Supreme Court of the United States in the decision already mentioned and gave their testimony in the citizenship hearing of Harry Bridges based, either in whole or in part upon the language contained in such decision of our Supreme Court, then they cannot have committed any crime and they must be found Not Guilty. (Tr. 265-267.)

No. 45: If the defendants Schmidt and Robertson read the opinion of the Supreme Court of the United States in the previous cause involving the attempted deportation of Harry Bridges and believed in the statements therein made and endorsed by the Supreme Court of the United States and then and there formed their own beliefs concerning the status of Harry Bridges, relying, either in whole or in part upon such statements as uttered by the Supreme Court of the United States to the end that they, the defendants Schmidt and Robertson gave testimony before the Superior Court of the State of California at San Francisco in support of the application of defendant Harry Bridges for admission to

citizenship, relying thereon, they cannot be held to have committed any crime at all and they must be then found by you to be Not Guilty. (Tr. 267-268.)

No. 46: The defendants Schmidt and Robertson are charged with having conspired to defraud the Government of the United States and they have asserted that any statements made by them, respectively, in connection with the application of Harry Bridges for citizenship, were made upon reliance, among other things, upon the language of the Supreme Court of the United States in the previous cause in which the deportation of Bridges was attempted.

You are instructed that the matter of intent is always an essential element of fraud. Whenever the belief of a person or the motive of his act or conduct is in issue, he may not only testify directly that he had no intent to defraud, but he may buttress such statement or denial with the testimony of relevant circumstances including the reading of properly authenticated public documents contending to support his own statements.

If you find that the defendants Schmidt and Robertson, in taking part, or aiding the defendant Harry Bridges in the advancement of his petition for citizenship, read the decision of the Supreme Court of the United States in the matter referred to and relied upon the verity of the same, then they have negatived the assertion of any intent to defraud, and the jury must consider such circumstances in passing upon their guilt or innocence. (Tr. 268-269.)

No. 47: If the jury find that the defendants Schmidt and Robertson, in the formulation of

their own respective states of mind concerning the status of Harry Bridges, read and relied upon the language in the previous cause in which the deportation of Bridges was attempted, and if you further find that they were led by the language of such decision to believe in the fitness of the defendant Harry Bridges to be admitted to citizenship, in such event no crime has been proved against the defendants Schmidt and Robertson and they must be found Not Guilty. (Tr. 270.)

No. 48: If the defendants Schmidt and Robertson relied, either in whole or in part, upon the language of the Supreme Court of the United States in the previous matter involving Harry Bridges as a basis for their statements and/or recommendations concerning his citizenship petition, they then possess the right to recount the language of the United States Supreme Court upon which they thus relied to obtain the benefit of whatever persuasiveness such language may carry. (Tr. 271.)

No. 50: Willful fraud is of the essence of the accusation brought against the defendants Schmidt and Robertson.

Hence the jury may consider any testimony bearing directly upon the question of the intent or the motives of the defendants Schmidt and Robertson in giving testimony in support of the citizenship petition of Harry Bridges.

If the jury finds that the defendants Schmidt and Robertson relied upon the language of the Supreme Court of the United States in the previous cause involving the attempted deportation of Bridges and were led thereby to believe that

Harry Bridges was eligible to citizenship, they must be found Not Guilty. (Tr. 272.)

These instructions should have been given because they correctly stated the law with respect to the subject matter thereof. (Tr. 7918.)

f. Defendants' Proposed Instruction No. 67-A.

The circumstances of a case may be such that an established reputation for good character standing alone may create a reasonable doubt as to guilt, even though without such evidence of good character, the evidence of guilt might be convincing. (Tr. 284.)

This instruction should have been given since the other instructions did not adequately cover the subject. (Tr. 7918.)

g. Defendants' Proposed Instructions Nos. 74, 74-A, 76, 78, 78-A, 78-B, and 78-C.

No. 74: The presumption of innocence, which surrounds and protects any defendant accused of crime under the American system of law, is not a mere literary phrase. It is a real and practical safeguard and it derives from our constitution and from the Bill of Rights, which guarantee to our citizens their general civil liberties.

Our constitution is not a silent or anemic witness to this, or any other criminal proceeding. It will not stand idly by while one of its subjects finds his liberty endangered in the absence of the fullest proof required by law.

Thus, you are advised that the presumption of innocence surrounds each defendant in this case at the moment of his accusation. It continues to

surround each defendant during all stages of the trial and it persists even into the moments of your deliberations in the jury room.

In a proper case, the presumption of innocence alone may suffice to rebut an entire prosecution. In a case such as the present one where each of the defendants has given testimony in his own behalf, the presumption of innocence surrounds each of such defendants during the giving of his testimony.

No such presumption attaches to any witness produced by the prosecution.

Therefore, you are admonished that in your deliberations you must consider all of the evidence adduced throughout this entire case in the light of the presumption of innocence to the end that, if any reasonable doubt exists as to the guilt of any defendant, it will become your duty to find such defendant Not Guilty. (Tr. 287-288.)

No. 74-A: In a criminal case the presumption of innocence, which attaches to any defendant, takes precedence over any other presumption.

For example, as to any witness giving testimony in any particular case, a disputable presumption exists to the effect that such witness is telling the truth, although, as you have been advised, this presumption may be repelled by the character or quality of the testimony of the witness, by the witness's manner of testifying, or by impeaching or contradictory evidence.

Any ordinary presumption of our law, such as the presumption concerning witnesses, is outweighed by the presumption of innocence, which attaches only to defendants in criminal cases.

Under our system of law the presumption of innocence is so important that it is deemed better that one hundred guilty persons go free than that one innocent person should suffer an unjust conviction. (Tr. 288-289.)

No. 76: I instruct you that a reasonable doubt is an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendants are guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendants are entitled to have the benefit. I further instruct you that if you have found one fact necessarily inconsistent with the guilt of the defendants, then, in that event, you must return a verdict of Not Guilty. (Tr. 289-290.)

No. 78: The doctrine of reasonable doubt means exactly what the phrase implies. It means that state of the record, viewed conscientiously by you, in which you cannot say you feel an abiding conviction to a moral certainty of the truth of the charges.

True, an imaginary or fanciful doubt will not give rise to the operation of the doctrine of reasonable doubt because the essence of this principle of our law demands a doubt based on reason.

But if, upon your examination of the evidence there does exist a doubt based upon reason as

to whether or not the guilt of the defendants or of any defendant, has been satisfactorily shown, then it must follow that you cannot possess an abiding conviction of the truth of the charges.

The defendants are not obliged to produce the greater weight of evidence in order to entitle themselves to an acquittal, because the burden of proof, which is upon the prosecution, never changes.

All that the defendants need establish, out of the whole of the evidence, is a reasonable doubt and if a reasonable doubt does exist it will become your duty to find the defendants Not Guilty. (Tr. 290-291.)

No. 78-A: I instruct you that if you find from the evidence that any of the attorneys, representatives, or agents of the Government who are connected with the prosecution of this case, or who engaged in the preparation of this case, have offered improper inducements in any form to any person or persons to testify in this proceeding, you may conclude from such evidence that the case of the prosecution is a weak or an unfounded one. This inference is not limited to any specific fact in the case but operates against the whole mass of facts constituting the case. (Tr. 291.)

No. 78-B: I instruct you that if you find from the evidence that any of the attorneys, representatives, or agents of the Government who are connected with the prosecution of this case, or who engaged in the preparation of this case, have knowingly used false testimony for the purpose of obtaining a conviction in this case, such conduct is inconsistent with the rudimentary de-

mands of justice and you should reject the entire case proffered by the prosecution. Such conduct, if you find it to exist, constitutes a violation of the fifth amendment to the Constitution of the United States and has no place in the trial of a case in these courts. (Tr. 292.)

No. 78-C: I instruct you that if you find that any of the attorneys, representatives, or agents of the Government who are connected with the prosecution in this case, or who engaged in the preparation of this case, have concealed or attempted to conceal any documents, files, records, or parts thereof, relevant or material to any of the issues in this proceeding, or which bear or could bear on the credibility of any of the witnesses called in this proceeding, you may conclude that such files, documents, records, or parts thereof, are adverse to the prosecution, and you may further conclude that the case of the prosecution insofar as those documents are relevant and material to it, is a weak and unfounded one. (Tr. 292-293.)

These instructions should have been given because they properly stated the law with respect to the presumption of innocence and the proper role of the various parties to the litigation. (Tr. 7919.)

h. Defendants' Proposed Instructions Nos. 79-83, inclusive.

No. 79: I instruct you that the Supreme Court of the United States on June 18, 1945, delivered an opinion wherein it reversed a judgment of the lower federal courts which had denied the defendant Bridges' application for a writ of habeas corpus which he sought to procure his release

from the custody of the Attorney General of the United States who was holding him in custody on a warrant for his deportation based upon a charge that the defendant Bridges was or had been a member of the Community Party in the United States.

In view of these circumstances I instruct you that you are not to consider any evidence in this case relating to the defendant Bridges' alleged membership in the Communist Party in the United States prior to the 18th day of June, 1945, those matters having been previously adjudicated. (Tr. 293-294.)

No. 80: I instruct you that the Board of Immigration Appeals, an agency of the Department of Justice, did on January 3, 1942, direct that a certain warrant of arrest against the defendant Bridges be cancelled and that certain proceedings against him be closed. That warrant of arrest and those proceedings were directed toward the deportation of the defendant Bridges and were based upon a charge that the defendant Bridges was or had been a member of the Communist Party in the United States.

In view of these circumstances I instruct you that you are not to consider any evidence in this case relating to the defendant Bridges' alleged membership in the Communist Party in the United States prior to the 3rd day of January, 1942, those matters having been previously adjudicated. (Tr. 294.)

No. 81: I instruct you that pursuant to a warrant issued by the Attorney General of the

United States under the applicable statutes, a hearing inquiring into the charges that the defendant Bridges was or had been a member of the Communist Party in the United States was concluded before a presiding Inspector of the Immigration and Naturalization Service of the Department of Justice on July 12, 1941, and that thereafter pursuant to subsequent legal proceedings in that case the said warrant was cancelled and the proceedings closed.

In view of these circumstances I instruct you that you are not to consider any evidence relating to the defendant Bridges' alleged membership in the Communist Party in the United States prior to the 12th day of July, 1941, those matters having been previously adjudicated. (Tr. 294-295.)

No. 82: I instruct you that on the 8th day of January, 1940, the Secretary of Labor, who at that time under the laws of the United States was the officer charged with such matters, cancelled a warrant which had been previously issued for the deportation of the defendant Bridges. This warrant had been issued upon the ground that the defendant Bridges was a member of the Communist Party. The cancellation of the warrant occurred after the Secretary of Labor accepted the findings of a Trial Examiner appointed pursuant to the applicable statutes to inquire into the truth or falsity of the charges.

In view of these circumstances I instruct you that you are not to consider any evidence in this case relating to the defendant Bridges' alleged membership in the Communist Party of the

United States prior to the 8th day of January, 1940, those matters having been previously adjudicated. (Tr. 295-296.)

No. 83: I instruct you that pursuant to a warrant issued by the Secretary of Labor of the United States under the applicable statutes, a hearing inquiring into the alleged membership of the defendant Bridges in the Communist Party was concluded before a Trial Examiner on September 14, 1939, and that thereafter pursuant to subsequent legal proceedings the said warrant was cancelled and the proceedings closed.

In view of these circumstances I instruct you that you are not to consider any evidence relating to the defendant Bridges' alleged membership in the Communist Party of the United States prior to the 14th day of September, 1939, those matters having been previously adjudicated. (Tr. 296.)

These instructions should have been given because they properly state the law with respect to the applicability of the doctrine of *res judicata* to these proceedings. (Tr. 7919.)

15. The trial Court committed prejudicial error in questioning the witness Meinecke and making statements in the presence of the jury concerning his purpose in asking certain questions of the said witness.

16. The Court erred in sustaining the following question addressed to the government witness Paul Crouch: "Have you been in any institution for nervous and mental disorders?"

17. The trial Court erred in sustaining the objection to the question asked the government witness Louis H. Michener: "And he has treated you for mental illness in '44, hasn't he?"

18. The trial Court committed prejudicial error in reading before the jury a statement of his reasons for refusing to permit counsel for the defense to cross-examine government witness Kessler concerning his activities in preparing the case against appellants.

19. The trial Court erred in denying the motion of appellants Schmidt and Robertson in arrest of judgment insofar as said motions related to the third count of the indictment.

20. The trial Court erred in denying the motions of each of the appellants for a new trial.

21. The trial Court erred in making its opinion, order and decree revoking appellant Bridges' citizenship because:

(a) It had no jurisdiction to proceed at all in the premises because an appeal was pending in this Court.

(b) The "conviction" did not have the finality which is required as a matter of law before the provisions of 8 U.S.C.A. 738(e) can be operative.

(c) Appellant Bridges was not convicted under any chapter of the Nationality Code as required by 8 U.S.C.A. 738(e).

(d) Appellant Bridges was not convicted of knowingly procuring naturalization in violation of law as required by 8 U.S.C.A. 738(e).

BACKGROUND OF THE CASE.

An indication of the background out of which this prosecution arose appears in the Introductory Statement, *supra*. In order for the meaning and significance of this case to be fully appreciated, however, it is necessary to relate here something of the history of the chief appellant, and the events of the last fifteen years in connection with the efforts of the Government first, to secure his deportation, and second, to secure his imprisonment. Normally the personal or even the social, economic or political history of a defendant would be regarded as immaterial in a criminal prosecution. However where, as here, that history is part and parcel of the case and is so interwoven with it as to make impossible a complete understanding of the case without it, it is material.

Harry Renton Bridges was born in Australia in 1901 (Tr. 4717.) As a young man he was exposed to the liberal trade union and mildly socialistic political philosophy which obtained in that commonwealth during the early years of this century. (Tr. 4726-4734.) A sense of adventure compelled him to leave his relatively well-to-do family and comfortable employment in Australia and go to sea. (Tr. 4719.) After four or five years at sea, he made a legal entry into the United States in 1920. (Tr. 4735.) After some maritime employment on American vessels which included a short tour of duty with the United States Coast and Geodetic Survey (Tr. 4738), he settled in San Francisco in 1922 or 1923 and became a longshoreman. (Tr. 4740.) Until 1934 he continued to earn his living

as a longshoreman and was indistinguishable from the thousands of other men who worked on the San Francisco waterfront during this period.

Due to the desperate conditions under which longshoremen were employed during those years, and undoubtedly spurred on in large measure by the impetus which President Roosevelt's "New Deal" gave to the organization of trade unions, there occurred in San Francisco in 1933 a revival of the International Longshoremen's Association, a trade union which had been relatively quiescent during the 1920's. (Tr. 4771-4775.) Bridges became a member of that organization and one of those who sought to have it adopt a bolder and more progressive program than its conservative leaders would permit. (Tr. 4775-4782.)

Henry Schmidt, too, was a longshoreman and a member of the union, and it was in those early days that he first met Bridges. (Tr. 4099.) Schmidt, born in Germany in 1899, had been brought as a boy to Canada and then to the United States by his father. (Tr. 4096.) He has lived in San Francisco since 1917 and was naturalized here a quarter of a century ago. (Tr. 4096-7.) Schmidt has long been active in the affairs of the San Francisco local of the longshoremen's union having, in addition to holding other offices, served as its president for many years.

Those who shared Bridges' views of what was proper Union program succeeded in the summer of 1933 in electing a considerable number of their supporters to the executive board of the San Francisco

local (Tr. 4790), and from that time on continued to exert a growing influence upon the union. (Tr. 4801.) As the events of that period rapidly unfolded, Bridges assumed an increasingly more significant position in the union, and when the strike erupted in May of 1934, he was elected chairman of the strike committee. (Tr. 4807.) Several months later, when the strike was settled and the men had gone back to work, they showed their support of Bridges' policies and activities by electing him President of the San Francisco local at its next election in September of 1934. (Tr. 43, 4802.) Some two years later, at the next regular election of the officers of the Pacific Coast District of the International Longshoremen's Association, the members of that association showed their confidence in the policies and program of Bridges by naming him their Pacific Coast District President. (Tr. 43, 4975, 4984-4985.) He has held that office ever since.¹³

Without reviewing in detail Bridges' work since 1934, it can be said that its principal, and for the most part successful, objective has been to remove from the lives of the longshoremen on the Pacific Coast what the judges of this very Court have described as "most vicious and inhumane practices". (*Bridges v. Wixon*, 144 F.2d 927, 938 [9 Cir., 1944].)

¹³In 1938 the Pacific Coast District of the International Longshoremen's Association withdrew from that organization and became the present International Longshoremen's and Warehousemen's Union. This action was taken pursuant to a secret referendum ballot of the membership of the Pacific Coast District. (Tr. 4953-4954.) Bridges has continued as President of the International Longshoremen's and Warehousemen's Union since that time.

As the union grew and expanded following the 1934 strike, workers in terminals and warehouses were organized by it. Appellant Robertson was a warehouseman who later became an official of the union. Robertson, born in Texas in 1905 (Tr. 4626) and now residing with his wife and two young children in Mill Valley, has been chiefly concerned with the problems of warehousemen and their organization. He is today, and was at the time the indictment was returned, a Vice-President of the International Union. (Tr. 150, 4555.)

In more recent years Bridges and his associates have devoted much of their time and effort to assisting the workers in Hawaii in their struggle against the feudal social, economic and political structure which obtains in that territory. (Tr. 4914-4917.) An inkling of the conditions against which Bridges and the union were and are struggling in Hawaii is found in a decision in which the trial judge below participated. (*I.L.W.U. v. Ackerman*, 82 F.Supp. 65 [DC Hawaii, 1949].)¹⁴

From the time of Bridges' legal entry into the United States in 1920 until the strike of 1934, the agencies of Government had no apparent concern with Bridges, with the question of his membership in, or affiliation with, any organization, or with his social, economic and political views, whatever they might

¹⁴Reversed, on grounds not here germane. (*Ackerman v. I.L.W.U.*, 187 F.2d 860 [9 Cir., 1951].)

have been. (Tr. 43, 44.) It is more than coincidence that it was only after an unremitting and notably successful struggle to mitigate the economic exploitation of longshoremen and other workers that first private agencies and then, unfortunately (not so much for Bridges, but for the very processes of government itself), agencies of Government undertook to wage a "concentrated and relentless crusade"¹⁵ against him, and undertook that whole series of investigations and hearings which make up the background of this case and which ultimately culminated in the present prosecution.

That crusade is unique in the annals of American legal history and is one which, irrespective of the ultimate fate of Harry Renton Bridges, the people and the Courts of the United States might well ponder. It is alarming not so much because of what it can or may ultimately do to the three individuals directly involved here, but because it represents a distortion of governmental process for the purpose of achieving a preconceived end and, if permitted to succeed, will make a mockery of the proud boast that ours is a government of laws and not of men.

Until the commencement of the present proceedings, the protagonists of this crusade functioned primarily through the executive and legislative branches of government. The Courts were not called upon to act as "instruments of executive expedience". (*Bridges v. United States*, 184 F.2d 881, 887 [9 Cir., 1950].) It is disheartening to realize that the trial

¹⁵*Bridges v. Wixon, supra*, 157.

Court herein did not resist the pressure to become a "mere instrument for carrying into effect the arbitrary will * * *" of the executive. (*Ibid.*) As we shall show, this attitude of the trial judge was not limited exclusively to the revocation of bail, but permeated the entire course of the trial and manifested itself clearly in a variety of ways and in a variety of situations.

Even the sketchiest outline of the crusade against Bridges illustrates its sordid nature and character and the intensity with which it has been pressed, irrespective of the fact that throughout the years decent, self-respecting, law-abiding Americans, including Americans in high position, have condemned it and have stated that it is a burden on the conscience of the American people. (Tr. 6497.)

The first evidence we have of the existence of efforts to deport Bridges is a report of the San Francisco District Director of Immigration and Naturalization made late in 1934. This report reveals that an investigation of Bridges' status had been undertaken by the District Director who worked closely with, and was aided and assisted by, the San Francisco Police Department. The District Director reported that his investigation had "failed to show that he [Bridges] is in any manner connected with the Communist Party, or any radical organization". (Tr. 47.) The District Director also reported that the San Francisco Police Department had "likewise been unable to obtain any evidence that the alien [Bridges] has ever been a member of the Communist Party or in any

manner directly affiliated therewith, or a member of any radical organization". (Tr. 47.)

Despite this report, private interests continued to press the Secretary of Labor (who in those years had jurisdiction over the Immigration and Naturalization Service) to secure the deportation of Bridges. In response to such pressure, the Commissioner of Immigration and Naturalization appointed three of his key staff officers to investigate the charges against Bridges. A memorandum, prepared in 1936 by these officers, reviewed all of the available data and concluded:

"In short, whenever any legal ground for the deportation of Bridges has been brought to the attention of the Department of Labor, it has been investigated but, invariably, it has been found that he was in the clear, and that his status as an immigrant was entirely regular." (Tr. 49.)

One would have thought that after these three investigations¹⁶ and the conclusions therein reached,¹⁷ the matter would have been put at rest, at least administratively. However, the pressure of powerful private groups—and some public agencies¹⁸—continued

¹⁶By the San Francisco Police Department, by the San Francisco District Director of Immigration and Naturalization, and by the staff of the Commissioner of Immigration and Naturalization in Washington, D.C.

¹⁷Conclusions which it must be assumed represented the "best" results obtainable by agencies which there is no reason to believe were at least not hostile to Bridges.

¹⁸The groups behind the campaign were shown in the hearing before Dean Landis, to which reference is made later, to have been primarily the Subversive Activities Committee of the American Legion and, strangely enough, the Portland Police Department.

unremittingly upon the Secretary of Labor and the Commissioner of Immigration and Naturalization, and, disregarding applicable principles of administrative *res judicata*,¹⁹ the Secretary of Labor caused another investigation into the same subject matter to be conducted by the solicitor of her department. In the course of this investigation Bridges was put under oath by the solicitor and was interrogated concerning the contention that he was or had been a member of the Communist Party, a contention which is the basis for the indictment in this very case. Bridges testified that he was not and had not been a member of the Communist Party or of any organization which believed, taught or published matters teaching or advocating the overthrow of the Government by force, and that he himself did not believe or advocate such doctrines. (Tr. 49-50.)

Thus by the end of 1937 there were in the files of the Secretary of Labor at least four distinct reports indicating that the charges against Bridges were unfounded. Again, one would have thought that a decent respect for orderly administrative process would have required that the investigations terminate and that the harassment of Bridges cease. But one who so thought would have reckoned without the tremendous pressures that were brought to bear upon

¹⁹*Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922); *United States ex rel. Girard v. Helvering*, 301 U.S. 540 (1937); *Choy Yuen Chan v. United States*, 30 F.2d 516 (9 Cir., 1929); *George H. Lee Co. v. Federal Trade Commission*, 113 F.2d 583 (8 Cir., 1940); *United States v. Willard Tablet Co.*, 141 F.2d 141 (7 Cir., 1944).

agencies of the Government to achieve the desired result.

As a result of such pressures, the Secretary of Labor in 1938 issued a warrant for the arrest of Bridges with a view toward his deportation upon the ground that he was a member of or affiliated with the Communist Party of the United States. (Tr. 50-54.) The contention of the Government was the same as the claim which it had theretofore investigated and resolved in Bridges' favor. It is the same contention which is the basis of the indictment in the present case. A hearing²⁰ was held on this warrant before a specially appointed examiner, the Honorable James M. Landis, former Dean of the Harvard Law School and former Chairman of the Securities and Exchange Commission. The issues framed by the warrant were thoroughly litigated. The Government introduced 138 exhibits on its behalf, and 136 were introduced on behalf of Bridges; a total of 60 witnesses were sworn and appeared; the stenographic transcript of the hearing comprises some 7700 pages. (Tr. 53.) Thereafter, the matter was thoroughly briefed and the Examiner, on December 28, 1939, transmitted his findings and conclusions to the Secretary of Labor. These findings and conclusions are based upon an exhaustive and painstaking analysis of the record before him. The conclusion upon the

²⁰Bridges himself requested such a hearing because he thought that it would put an end once and for all to the harassment to which he had been subjected over the three or four preceding years. (Tr. 4895.) How naive he was in his belief is demonstrated by the balance of this melancholy history.

entire record was that the evidence established neither that Bridges was a member of nor that he was affiliated with the Communist Party of the United States of America. The Secretary of Labor approved this conclusion and cancelled the warrant of deportation. (Tr. 55.)

Thus, by the beginning of 1940, there were as a matter of public record at least five separate and distinct reports, one of which, while possibly quasi-judicial in form, represented in fact the judicial process at its best, in that it involved a full-dress hearing with a complete receipt of evidence on both sides, a thorough briefing of the issues involved, and a careful judicial analysis of the evidence presented,²¹ all arriving at the same conclusion, to-wit, that Bridges was neither a member of, nor affiliated with, the Communist Party.

The publication of the Landis report, instead of putting at rest once and for all the controversies raging around Bridges, only led to increased demands that he be deported. Since partisans of his deportation had failed of their purpose in the executive (administrative) forum, and since there was no basis upon which they could proceed in the judicial forum, they chose to make a direct legislative attack upon Bridges. The fact that they did so shows the intensity (as well as the unconstitutionality) of their drive. A special bill was passed by the House of Representatives directly the Attorney General forth-

²¹See Mr. Justice Frankfurter, concurring in *Adamson v. California*, 332 U.S. 46, 59 (1947).

with to take Bridges into custody and to deport him “notwithstanding any other provisions of law” (H.R. 9766, 76th Cong., 3d Sess.). The bill died in a Senate Committee after Attorney General (now Mr. Justice) Jackson denounced it as contrary to one hundred and fifty years of American legal tradition, and a clear violation of constitutional provisions. (S. Rep. 2031, 76th Cong., 3d Sess., p. 9.)

Thereupon, and presumably to give a semblance of legality to its conduct, Congress amended the deportation law, overturning a Supreme Court decision (*Kessler v. Strecker*, 307 U.S. 22 [1939]) in the process. It is clear that this legislative reversal of the Supreme Court of the United States was motivated in large part by a desire to make it possible to proceed again against Bridges. The author of the amendment did not conceal his purpose. He said:

“It is my joy to announce that this bill will do, in a perfectly legal constitutional manner, what the bill specifically aimed at the deportation of Harry Bridges seeks to accomplish. This bill changes the law so that the Department of Justice should now have little trouble in deporting Harry Bridges and all others of similar ilk.” (86 Cong. Rec. 9031.)

The prophecy was quickly realized. The new Attorney General, Francis Biddle, directed the Federal Bureau of Investigation to reopen the Bridges case, and, after having received a report from that agency—a report, incidentally, which impugned the integrity of Dean Landis—issued a new warrant in 1941 (Tr.

56-58) for the arrest and deportation of Bridges upon substantially the same grounds set forth in the earlier warrant. Pursuant to this warrant a hearing upon the same old issue (whether or not Bridges was or had been a member of, or affiliated with, the Communist Party) was held before Charles B. Sears, duly designated as the Presiding Inspector. This hearing, like the Landis hearing, was a very exhaustive one. The Government introduced 297 exhibits on its behalf, and 62 were introduced on behalf of Bridges; a total of 63 witnesses were sworn and appeared, only two of whom were witnesses in the 1939 hearing before Dean Landis, both of them having on that occasion appeared on behalf of Bridges; and the stenographic transcript ran to upwards of 7500 pages. (Tr. 59.) The matter was briefed, argued and exhaustively litigated.

This litigation was finally determined in Bridges' favor by a decision of the Supreme Court of the United States in 1945. (*Bridges v. Wixon, supra.*) The stages of the proceedings which intervened from the time of the hearing before Judge Sears to the decision of the Supreme Court are succinctly summarized by Mr. Justice Douglas:

"The inspector designated to conduct the hearings and make a report, Hon. Charles B. Sears, found * * * that after entering this country Harry Bridges had been affiliated with both organizations [the Communist Party and the Marine Workers Industrial Union] and had been a member of the Communist Party. He recommended deportation. The case was heard by the Board

of Immigration Appeals which found that Harry Bridges had not been a member of or affiliated with either of those organizations at any time after he entered this country. The Attorney General reviewed the decision of the Board and rendered an opinion in which he made findings in accordance with those proposed by the inspector and ordered Harry Bridges to be deported. A warrant of deportation was issued. Harry Bridges surrendered himself to the custody of the respondent and challenged the legality of his detention by a petition for a writ of *habeas corpus* in the District Court for the Northern District of California. That court denied the petition and remanded petitioner to the custody of respondent. 49 F.Supp. 292. The Circuit Court of Appeals affirmed by a divided vote. 144 F.2d 927, 944. The case is here on a petition for a writ of certiorari which we granted because of the serious character of the questions which are presented." (*Bridges v. Wixon*, 326 U.S. 135, 139-140.)

The judgment of this Court, affirming the District Court's order denying the application for habeas corpus, was reversed on the grounds that the deportation order was based upon a misconstruction of the term "affiliation" used in the applicable statute, and that the hearing on the question of Bridges' membership in the Communist Party was unfair because of the receipt of inadmissible and highly prejudicial hearsay evidence. (*Bridges v. Wixon*, *supra*, at 156.)

This decision of the Supreme Court was announced on June 18, 1945. It represented what men could reasonably have believed would be the final step in

the "relentless crusade". This had been a crusade which had never before been witnessed in this land. At no time in American administrative or judicial history had there been four, five or six separate and distinct investigations into the same subject matter, all of which ultimately reached the same result and conclusion.

The Supreme Court having finally put an end to this invasion of his constitutional²² rights and thereby having removed all obstacles, Bridges immediately pressed his pending application for citizenship. Five days after the decision of that Court, he took the steps which led to his becoming naturalized some three months later, and which also led to the present indictment and conviction against him.

One would have thought that the forces which were behind the crusade against Bridges would have acknowledged their defeat with the decision of the Supreme Court in 1945, and would have withdrawn from the field of combat. However, as the record in the present case demonstrates, they did no such thing. It may be surmised that for a year or two after the naturalization in 1945, Bridges' adversaries were satisfied to accept the final determination of the Supreme Court. But with the rise of international as

²²Mr. Justice Murphy noted that

"* * * the Constitution has been more than a silent and anemic witness to this proceeding. It has not stood idly by while one of its subjects is being excommunicated from this nation * * * When the immutable freedoms guaranteed by the Bill of Rights have been so openly and concededly ignored, the full wrath of constitutional condemnation descends upon the action taken by the Government." (*Bridges v. Wixon*, *supra*, at 161-162.)

well as domestic tensions in 1947, it became apparent that those who feared and opposed Bridges' viewpoint and influence upon the longshoremen and other workers on the Pacific Coast, determined at all costs to rid themselves of that influence. Not only did the Attorney General make it plain a year and a half before this prosecution was instituted that the Government intended to remove Bridges from his trade union position, not because of any crime he allegedly committed but because of his alleged viewpoint, and because of the exigencies of the international situation (Tr. 6072-6074); but on the very eve of this prosecution that same officer made it clear that in his view the prosecution was achieving a predetermined objective with respect to the settlement of economic controversies in the Hawaiian Islands. (Tr. 73-76, 146.)

It is not surprising that the chief proponents of a persecution such as we have outlined above should not be too concerned about the means which they used to achieve their end. As the late Justice Murphy pointed out, "Wire-tapping, searches and seizures without warrants and other forms of the invasion of the right of privacy have been widely employed in this deportation drive." (*Bridges v. Wixon*, 326 U.S. 135, 159.) Both Dean Landis and Judge Sears had occasion to characterize the witnesses produced by the Government in a manner which left little doubt of the fact that every one of them perjured himself when he swore that Bridges was a member of the Communist Party. Both Dean Landis and Judge Sears, furthermore, were compelled to find in their respective cases

that the Government had used improper inducements to obtain perjured testimony and that the Government had engaged in a violation of the federal wire-tapping statutes in connection with the deportation drive. One of the judges of this Court has said that the evidence produced before Judge Sears "would be condemned and proscribed without hesitation by any American court". (*Bridges v. Wixon*, 144 F.2d 927, 943.)

A striking feature of both the present effort to imprison Bridges and the earlier efforts to deport him is that in both governmental process was not invoked in good faith to enforce deportation or penal statutes, but was made an instrument to achieve certain political objectives and silence criticism and dissent.

Bridges and the other appellants are not being prosecuted here because of any real concern by the Department of Justice that Bridges did or did not testify falsely before Judge Foley; they are being prosecuted here because of a great concern by the Department of Justice that their position of leadership and influence upon the longshoremen of the West Coast, coupled with their viewpoint respecting certain social and political problems, may represent an impediment to the carrying out of certain policies of the present Administration.

The ultimate proof came with the Government's efforts, acquiesced in by the trial Court, to deprive Bridges of his liberty in July of 1950 by the device of seeking to have his bail revoked. Although the Government had maintained throughout the trial that the case was a simple perjury prosecution, its motive

became crystal clear when it sought to imprison Bridges because he expressed his views and opinions upon matters of foreign policy. Despite the fact that his appeal to this Court admittedly presented substantial questions for determination and was being prosecuted by him in good faith, the trial Court, basing its action on Bridges' expressions of opinion, caused him to be imprisoned at the Government's behest.

Whether or not the judges of this Court agree or disagree with Bridges' views is beside the point. The point which the judges of this Court must consider is whether they, as such judges, will permit a department of Government to utilize the judicial processes of the United States for the purpose of achieving what are plainly and palpably political ends. As the Supreme Court said in *Douglas v. Jeannette*, 319 U.S. 157 (1943), no person is immune from a prosecution *instituted in good faith*. Conversely, all persons must be held immune from prosecutions instituted in bad faith or for improper motives. No Court can permit the law to be made an instrument in the hands of those temporarily vested with the authority of the state to achieve their transient ends without at the same time destroying the integrity of the law.

Another feature of the deportation proceedings on the one hand, and the present criminal proceeding on the other, is the similarity of the methods by which evidence was sought and the nature and character of what was obtained. A comparison of the record in this case with the records before Dean Landis and

Judge Sears brings to mind the aphorism that a leopard cannot change his spots. Even the most superficial reading of the record in the present case demonstrates that every reason which compelled both the Dean and the Judge to reject the testimony of the witnesses proffered by the Government in their respective cases, exists here. Witnesses gave testimony which could not, from the physical facts adduced, possibly have been true. One witness had for about a quarter of a century been living a life which was a total lie. (Tr. 2166 *et seq.*) Another witness' testimony was bought and paid for by the sheerest and most transparent of devices. And yet here the Government prosecutors fought more vigorously (Tr. 2143 *et seq.*) (if that was possible) than did their predecessors in the two previous hearings to protect and cover up for the witnesses they put on the stand. In this they were aided by the rulings of the trial Court, which threw a protective mantle around the shoulders of those witnesses (Tr. 3580 *et seq.*) and made it well-nigh impossible for the appellants to use the only weapon at their command—the weapon of cross-examination—to pierce the tissue of lies which emanated from the Government's witnesses.

The testimony upon which the Government seeks to imprison appellants in this proceeding cannot be described in any terms more charitable than those heretofore used to characterize the evidence upon which Bridges' deportation has been sought. An analysis of the record herein will show that the Government's witnesses in the instant case must be con-

demned in harsher and more stinging language than employed by previous judges in the earlier cases.

This, then, is the background against which this case must be judged.

We shall demonstrate in this brief that, as a matter of law, this prosecution should have never been begun or been permitted to go to trial. We shall demonstrate that the evidence does not support the jury's verdict. We shall demonstrate that at the trial, appellants were not accorded that fairness and impartiality from the Court to which they were entitled.

SUMMARY OF ARGUMENT.

1. The prosecution of all appellants on all counts is outlawed by the statute of limitations. The War-time Suspension clause does not apply to this case. Neither does the "savings clause" of the Act of June 25, 1949.

2. Appellant Bridges was denied due process of law, was subjected to double jeopardy, and was deprived of the benefits of the doctrine of *res judicata* by the succession of proceedings against him concerned with the same issue of fact.

3. None of the counts of the indictment state facts sufficient to constitute an offense against the United States. The alleged false answer which is the basis of the first and second counts of the indictment was to an immaterial question. The third count does not

state facts to bring it within any known statutory crime.

4. The evidence is insufficient to sustain a conviction under the indictment. There is no direct evidence of a conspiracy. There is no circumstantial evidence from which a jury could infer the existence of a conspiracy. There is no evidence that appellants Robertson and Schmidt were guilty of aiding or assisting appellant Bridges to procure naturalization in violation of law.

5. The trial Court erred in unduly restricting the cross-examination of Government witnesses and in preventing appellants from showing the interest, bias and mental state of such witnesses. It also erred in its own examination of defense witnesses.

6. The trial Court erred in improperly instructing the jury and in failing to give appropriate and necessary instructions.

POINT I.

THE STATUTE OF LIMITATIONS OUTLAWS THIS PROSECUTION.

(Specification of Errors, 1-3.)

THE PROBLEM.

The indictment was returned on May 25, 1949, and alleges that the crimes charged were committed "on or about the 23rd day of June, 1945, and continuing thereafter until on or about October 1, 1945, and for some time prior thereto" (Count 1), and "on Sep-

tember 17, 1945'' (Counts 2 and 3). Therefore, more than three years elapsed from the commission of the alleged crimes to the return of the indictment.

On the date on which the indictment was returned and for some nine months prior thereto, the statute of limitations applicable to criminal proceedings read as follows:

“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.” (18 U.S.C.A. 3282.)

On the face of it, therefore, this prosecution is outlawed.

The trial Court, however, held that appellants were not protected by the three-year statute of limitations. It adopted the argument of the Government which was substantially this:

(1) The three-year statute of limitations applicable to Count 1 of the indictment was suspended for the duration of the war by the Wartime Suspension of Limitations Act. (18 U.S.C.A. 3287.)

(2) As to Counts 2 and 3 of the indictment:

(a) The Suspension Act also tolled the running of the statute of limitations since “fraud” was “implicit” in all counts of the indictment. (*United States v. Bridges*, 86 F. Supp. 922, at 927.)

(b) §21 of the Act of June 25, 1948—the statute enacting the new Title 18 of the United

States Code—"saved" the prosecution from the effect of the three-year limitation and imposed upon it the five-year limitation found in 8 U.S.C.A. 746(g), despite the fact that the latter statute had been repealed effective September 1, 1948.¹

Neither of these contentions² is sound.

SUMMARY OF ARGUMENT.

1. The Suspension Act (18 U.S.C.A. 3287) is not applicable to the offense described in the indictment. That Act suspends statutes of limitations "applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner whether by conspiracy or not * * *"³

¹The recodification of Title 18 had no effect on the period of limitations applicable to Count 1 of the indictment since both before (18 U.S.C.A. [old] 582) and after (18 U.S.C.A. 3282) September 1, 1948, the normal period of limitations for the crime of conspiracy was three years.

²The Government also contended that the general saving clause—1 U.S.C.A. 109—was applicable to the indictment. But the trial Court having ruled for the Government upon the grounds mentioned in the text, found it unnecessary to give consideration to this contention. (*United States v. Bridges*, 86 F. Supp. 922, 927 [N.D. Calif., 1949].) Consequently we will not discuss this matter in the opening brief. Should the Government urge this ground upon the Court, we reserve the right to discuss 1 U.S.C.A. 109 in our reply brief. We note, however, that the Government's contention has recently been rejected by the Court of Appeals for the Second Circuit. (*United States v. Obermeier*, 186 F.2d 243 [Cir. 2, 1950], cert. den. U.S., 71 S. Ct. 573, 95 L. ed. 452 [1951].)

³The Suspension Act as it appears in 18 U.S.C.A. 3287 is identical, except for changes in phraseology, with former 18 U.S.C.A. 590(a) (Revisers Note, 18 U.S.C.A. 3287).

It is not applicable in any case unless at least two requirements are present in the statute defining the offense: (1) the purpose or intent to defraud the United States, and (2) pecuniary or property loss to the United States.

In a series of cases decided in the 1920's and 1930's⁴ the Supreme Court construed the 1921 proviso to the general statute of limitations and the 1926 proviso to the Revenue Act of 1926, which both are in pertinent part identical predecessors of the Suspension Act, as applicable only to offenses in which intent to defraud is an element of the statute defining the offense. Numerous lower Court cases without exception are to the same effect. When Congress enacted the Suspension Act in 1942, employing the essential language of the 1921 and 1926 provisos, it adopted the construction given by the Courts to such language and made it a part of the indictment.

"Fraud" *as used in the Suspension Act*, means the causing of pecuniary or property loss to the United States. This is the primary and ordinary meaning of the word and there are no apt words in the Suspension Act extending its meaning to a broader scope, such as the words "for any purpose" which appear in the general conspiracy statute. Provisions of the Contract Settlement Act and the Surplus Property Act, of which the Suspension Act was a part before the recodification of Title 18, emphasize that "fraud" in the Suspension Act is limited to its

⁴*United States v. Noveck*, 271 U.S. 201 (1926); *United States v. McElvain*, 272 U.S. 633 (1926); *United States v. Scharton*, 285 U.S. 518 (1932).

primary meaning. The reports accompanying the bill which became the Suspension Act⁵ demonstrate a legislative intent to limit suspension to offenses involving pecuniary or property loss to the United States. The Court of Appeals for the District of Columbia⁶ and the Court of Appeals for the Second Circuit⁷ so construed the statute in cases which are dispositive of the issue here.

Neither intent to defraud nor pecuniary or property loss to the United States is an element of the offenses charged in the second and third counts of the indictment. Likewise, pecuniary or property loss to the United States is not an element of the offense charged in the first count of the indictment. In fact, the Court below so held. (*United States v. Bridges*, 86 F. Supp. 922, 927 [N.D. Calif., 1949].)

Therefore, since the Suspension Act is applicable only to offenses in which both intent to defraud and pecuniary or property loss to the United States are elements, and since intent to defraud and pecuniary or property loss to the United States are not elements of the offenses here charged, the Suspension Act is not applicable to this proceeding.

2. §21 of the Act of June 25, 1948, does not save this prosecution from the effect of the three-year statute of limitations. It does not preserve to the United States the cause of action after the three-year

⁵See Appendix.

⁶*Marzani v. United States*, 168 F.2d 133 (App. D.C., 1948, affirmed by a divided court 335 U.S. 895 (1948)).

⁷*United States v. Obermeier*, *supra*.

period has run. The Court of Appeals for the Second Circuit has so construed that section in a case which is dispositive of the issue here.⁸ §21 repeals specifically enumerated provisions of the Revised Statutes and the Statutes at Large, including the five-year statute of limitations found in 8 U.S.C.A. 746(g), which were inconsistent with the provisions of the new Title 18, and provides "any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal."

The legislative history of Title 18 demonstrates that Congress intended to codify into one harmonious whole the criminal law of the United States, and that §21 was enacted for the express purpose of removing from the statute books laws which were inconsistent with that purpose. It was not the purpose of §21 to bring back into the Criminal Code matter which the Congress sought to delete from it. The legislative history of the three-year statute of limitations (18 U.S.C.A. 3282) demonstrates that Congress deliberately intended to eliminate the five-year statute of limitations of the old Nationality Code. The use of the words "rights or liabilities" in §21 indicates that Congress did not intend to refer to procedural matters such as periods of limitations. Other legislation establishes that Congress was familiar with the appropriate method of treating with periods of limitation when it so intended.

3. Statutes of limitations are statutes of repose and are to be construed liberally in favor of the accused

⁸*United States v. Obermeier, supra.*

and strictly against the Government. Provisos which make exception to, or limit the operation of, statutes of limitations are to be construed strictly against the Government and liberally in favor of the application of the general statute of limitations.

ARGUMENT.

I.

THE SUSPENSION ACT IS NOT APPLICABLE TO THIS CASE.

The precise issue as to whether or not the three-year statute of limitations is suspended turns on whether the Suspension Act, which applies to offenses involving "fraud or attempted fraud against the United States * * * in any manner, whether by conspiracy or not," applies to the offenses here, which are substantially, first, a conspiracy to defraud the United States by making a false statement in a naturalization proceeding, second, the making of such a false statement, and third, aiding the unauthorized procurement of naturalization.

To determine this issue it is necessary to consider the legislative history and applicable decisions of the Courts relating to the Suspension Act on the one hand, and to the offenses here charged on the other.

A. ITS HISTORY AND JUDICIAL INTERPRETATION DEMONSTRATE THAT THE SUSPENSION ACT IS NOT APPLICABLE UNLESS INTENT TO DEFRAUD THE UNITED STATES AND PECUNIARY OR PROPERTY LOSS TO THE UNITED STATES ARE ELEMENTS OF THE OFFENSE CHARGED.

(1) Background of the Suspension Act.

The essential wording of the Suspension Act, "fraud or attempted fraud against the United States * * * whether by conspiracy or not and in any manner" (18 U.S.C.A. 3287) derives originally from a proviso to the general three-year statute of limitations added on November 17, 1921 (c. 124, §1, 42 Stat. 220) in connection with war frauds arising out of the first world war. This 1921 proviso read:

"Provided, however, that any offenses involving the *defrauding or attempts to defraud the United States* or any agency thereof, *whether by conspiracy or not, and in any manner*, and now indictable under the existing statutes, the period of limitations shall be six years * * *" (Italics added.)

This proviso was construed by the Supreme Court in *United States v. Noveck*, 271 U.S. 201 (1926) and *United States v. McElvain*, 272 U.S. 633 (1926). A proviso in the Revenue Act of 1926 (Feb. 26, 1926, c. 27, §1110[a], 44 Stat. 114) in identical language was further construed by the Supreme Court in *United States v. Scharton*, 285 U.S. 518 (1932). To overcome the effect of these decisions, which held the language of the provisos inapplicable to the offenses charged, the Revenue Act of 1926 was amended. (See *Braverman v. United States*, 317 U.S. 49, 54-55 [1942].)

Shortly after the United States became involved in the second world war, the Act of August 24, 1942 (c. 555, §1, 56 Stat. 747) was passed. This Act provided in pertinent language identical with that of the 1921 and 1926 provisos as follows:

“The running of any existing statute of limitations applicable to any offense against the laws of the United States, involving *defrauding or attempts to defraud the United States, whether by conspiracy or not, and in any manner* and now indictable under any existing statutes shall be suspended until June 30, 1945, or such earlier time as the Congress by concurrent resolution or the President may designate.” (Italics added.)

The foregoing Act was amended by the Contract Settlement Act of July 1, 1944 (c. 358, §1 *et seq.*, 58 Stat. 649, 41 U.S.C.A. §101 *et seq.*) and the Surplus Property Act of October 3, 1944 (c. 479, §1 *et seq.*, 58 Stat. 781, 41 U.S.C.A. 201, formerly 50 U.S.C.A. App. 1611 *et seq.*),¹⁰ which eliminated the phrase “now indictable under any existing statutes”, added the clauses now numbered (2) and (3), and changed the suspension date from June 30, 1945, to three years after the termination of hostilities as proclaimed by

¹⁰The Revisor's Notes appended to the new Title 18 show clearly that the Suspension Act in its present form is derived from such prior legislation as the Surplus Property Act of 1944 and the Contract Settlement Act of 1944, and was intended to have only the limited effect which those acts had. Nothing in the Revisor's Notes indicates an intention to broaden the field within which the suspension was to operate.

“When the provisions of the War Contract Settlements Act of 1944, upon which this section is based * * *”

“Phrase (2) * * * [of this section] * * * was derived from Section 28 of the Surplus Property Act of 1944 * * *” (Revisor's Note, 18 U.S.C.A. 3287.)

the President or by a concurrent resolution of Congress.

In all essential respects, however, Clause 1 of 18 U.S.C.A. 3287 is identical¹¹ with the 1921 proviso, *supra*, the 1926 proviso, *supra*, and the Act of August 24, 1942, *supra*.

Since Congress in enacting the Suspension Act employed the essential language of the 1921 and 1926 provisos, it is clear under well-settled rules of statutory construction that it adopted also the judicial construction given to such language and made it a part of the enactment. (*United States v. Ryan*, 284 U.S. 167 [1931]; *Apex Hosiery Co. v. Leader*, 310 U.S. 469 [1940]; *Shapiro v. United States*, 335 U.S. 1 [1948].) This view is confirmed by the legislative history of the Act of August 24, 1942. Both the House and Senate Reports¹² refer specifically to the 1921 proviso, the circumstances surrounding its enactment, and the necessity for a *similar* suspension of the normal statute of limitation during the second world war.

¹¹In the 1948 codification grammatical changes were made so that the words "defrauding or attempts to defraud" were replaced by the words "fraud and attempted fraud". The change was obviously not one of substance, but, as the Reviser's Notes indicate, merely a part of the formal changes in phraseology made throughout the revision. (18 U.S.C.A. 3287, Reviser's Note; 80 Cong., H. Rep. No. 304.)

¹²See Appendix.

- (2) **Necessity of the presence of intent to defraud as an element of the offense as a condition of the applicability of the Suspension Act.**

The judicial construction given to the 1921 and 1926 provisos and therefore properly to be given to the Suspension Act, is that the suspension of the statute of limitations is applicable only where the defrauding or attempting to defraud the United States is an essential ingredient of the offense. One essential ingredient in such defrauding is the *purpose or intent to defraud*.

In *United States v. Noveck, supra*, the defendant was indicted for perjury for having falsely understated his taxable income. The offense was committed more than three years prior to the return of the indictment. The Government contended that since the perjury was committed in the making of an income tax return and *was specifically alleged to have been committed for the purpose of defrauding the United States*,¹³ the offense was brought within the six-year period of limitations of the 1921 proviso. The Supreme Court affirmed the quashing of the indictment by the District Court on the ground that the prosecution was barred by the three-year statute of limitations and said:

“But the alleged purpose to defraud the United States is not an element of the crime * * * on which the indictment is based. That allegation does not affect the charge; it need not be proved and may be rejected as mere surplusage * * *

¹³The form of the pleading did not deceive the Court as to the nature of the crime involved. It should not deceive this Court either. See *infra*.

The construction * * * contended for by the government divides perjury into two classes. It makes one include offenses having the elements specified [in the perjury statute] and the other to include those containing the further element of purpose to defraud the United States. And that would apply similarly to every offense to which the three year period * * * was applicable before the proviso was added. The effect is to create offenses separate and distinct from those defined by specific enactments. Obviously that was not intended. The Act of November 17, 1921, merely added a proviso to a statute of limitations. Statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose so to do is plain. The language in question does not require the construction contended for. Indeed it is not at all appropriate for the making of such classifications or the creation of offenses. Its purpose is to apply the six year period to every case in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense. There are several such offenses. Section 37 affords an illustration¹⁴ but perjury, as defined * * * does not contain any such element." (*Ibid.*, 271 U.S. at 203-204.)

In *United States v. Scharton*, *supra*, the defendant was charged with wilfully attempting to evade and defeat taxes by falsely understating taxable income.

¹⁴This observation was subsequently modified by the Court in *United States v. McElvain*, *supra*, where the Court refused to apply the six-year limitation established by the 1921 proviso to an indictment charging a *conspiracy* to defraud the United States by filing a false income tax return, saying:

"The language of the proviso *cannot reasonably be read to include all conspiracies* defined by Section 37." (See *infra*.)

The District Court sustained his plea in bar that the offenses were committed more than three years prior to the return of the indictment and held inapplicable the six-year period of limitations fixed by the 1926 proviso, *supra*.

In the Supreme Court the Government contended that fraud is implicit in the concept of evading and defeating, and that attempts to obstruct or defeat the lawful functions of any department of the Government on the one hand, or to cheat it out of money to which it is entitled on the other, are attempts to defraud the United States if accompanied by deceit or other dishonest methods. The Government's position particularly was that any effort to defeat or evade a tax possesses every element of an attempt to defraud. The Supreme Court rejected this position and affirmed the judgment of the District Court, saying:

“We are required to ascertain the intent of Congress from the language used and to determine what cases the proviso intended to except from the general statute of limitations applicable to all offenses against the internal revenue laws.” (*Ibid.*, 285 U.S. at 521.)

The Supreme Court analyzed the applicable sections of the internal revenue law and concluded that under the section upon which the indictment was based it would be sufficient to plead and prove a wilful attempt to evade or defeat, and that an averment of intent to defraud the United States would be surplusage since the latter was not an essential element of the offense. Thereupon it said:

“As said in the *Noveck* case, statutes will not be read as creating crimes or classes of crimes unless clearly so intended, and obviously we are here concerned with one meant only to fix periods of limitation. Moreover, the concluding clause of the section, though denominated a proviso, is an excepting clause and therefore to be narrowly construed. *United States v. McElvain*, 272 U.S. 633 * * * And, as the section has to do with statutory crimes, it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses.” (*Ibid.*, 285 U.S. at 521-522.)

From these decisions, it is clear that where a crime, such as perjury, or the wilful attempt to evade and defeat a tax by false statements, is a distinct offense complete in itself and does not involve as an essential ingredient of the crime, the purpose or intent to defraud the United States, the Suspension Act based on the 1921 and 1926 provisos and now embodied in the first clause of 18 U.S.C.A. 3287, does not apply. The Supreme Court has rejected the contention that fraud or the intent to defraud is implicit in such separate crimes. It has refused to allow the 1921 and 1926 provisos to be used to create new classes of crimes involving defrauding unless clearly so intended and it has refused to find such an intent in these provisos. It has disregarded the form of the provisos and held them to be excepting clauses to be liberally interpreted in favor of repose and not to be extended by construction to embrace frauds not so denominated by the statutes containing the offenses.

- (3) Necessity of the presence of pecuniary or property loss to the United States as an element of the offense as a condition of the applicability of the Suspension Act.

The terms "defrauding the United States" or "fraud against the United States" have at least two accepted meanings and the question to which we now direct ourselves is which of these two meanings is to be accorded to the phrase as used in the first clause of 18 U.S.C.A. 3287.

The usual and primary meaning is cheating the Government out of property or money. (*Hammerschmidt v. United States*, 265 U.S. 182 [1924]; *United States v. Cohn*, 270 U.S. 339 [1926].)

In statutes where it is apparent from the context or otherwise that more was intended, defrauding has been held to have a secondary and broader meaning of interfering with or obstructing lawful governmental functions by dishonest means. (*United States v. Keitel*, 211 U.S. 370 [1908]; *Haas v. Henkel*, 216 U.S. 462 [1910]; *Curley v. United States*, 130 F. 1 [1 Cir. 1904], cert. den. 195 U.S. 628 [1904].) For example, the Courts have uniformly held that the word "defraud" in the general conspiracy statute is to be given its secondary and broader meaning "which must result from the words 'in any manner or *for any purpose*' by which word 'defraud' is accompanied in the statute." (*United States v. Keitel, supra*, at 393.)

On the other hand, in statutes where neither the language nor the context warrants an extension of the term "defrauding" to a secondary and broader meaning, the Courts have held that the term is to be

construed in its primary sense of cheating the government out of property or money. Thus in *United States v. Cohn, supra*, the Court, in distinguishing "defrauding" as used in the False Claims statute (18 U.S.C.A. [old] 80) prior to its 1934 amendment, from its use in the general conspiracy statute, said:

"It is contended by the United States that by analogy to the decisions in *Haas v. Henkel*, 216 U.S. 462 * * * and *Hammerschmidt v. United States*, 265 U.S. 182 * * * and other cases involving the construction of Section 37 of the Penal Code relating to conspiracies to defraud the United States, the word 'defrauding' in the present statute should be construed as being used not merely in its primary sense of cheating the government out of property or money, but also in the secondary sense of interfering with or obstructing one of its lawful governmental functions by deceitful and fraudulent means. The language of the two statutes is, however, so essentially different as to destroy the weight of the supposed analogy. Section 37, by its specific terms, extends broadly to every conspiracy 'to defraud the United States in any manner and for any purpose' with no words of limitation whatsoever, and no limitation that can be implied from the context. Section 35 [the False Claims Act] on the other hand has no words extending the meaning of the word 'defrauding' beyond its usual and primary sense. On the contrary, it is used in connection with the words 'cheating or swindling', indicating that it is to be construed in a manner in which those words are ordinarily used, as relating to the fraudulent causing of pecuniary or property loss. And this meaning is emphasized by

other provisions of the section in which the word 'defraud' is used in reference to obtaining of money or other property from the government by false claims, vouchers, and the like; and by the context of the entire section, which deals with the wrongful obtaining of money and other property of the government, with no reference to the impairment or obstruction of its governmental functions." (*Ibid.*, 270 U.S. at 346-347.)

Applying these criteria to the term "fraud" in the Suspension Act, it is apparent that the term in this statute is limited to its primary sense of cheating the government out of property or money. There are no words extending the meaning of the term beyond this primary sense. It is true that the words "in any manner, whether by conspiracy or not" are used in connection with the term "fraud" but these relate to devices and methods of defrauding and not to its scope. The case would be different if, as in the general conspiracy statute, the words "or for any purpose" were also employed. To defraud the United States in any manner *or for any purpose* would encompass the broadest scope of fraud as the courts have indicated in the cases under the conspiracy statute. Had Congress intended in enacting Clause 1 of the Suspension Act to extend the meaning of defrauding beyond its usual and primary sense, it could easily have done so by broadening the language to read defrauding "in any manner, whether by conspiracy or not, *or for any purpose*", and this would have included interference by decep-

tive practices with lawful functions of the government. The failure to do so, particularly in view of the judicial construction placed upon the narrower language of the proviso, indicates a contrary intent.

Moreover, other sections and the entire text of the Contract Settlement Act and the Surplus Property Act, from which the Suspension Act derives, emphasize that “fraud” in the first clause thereof is limited to its primary meaning.

Thus the declaration of policy of the Contract Settlement Act states five objectives, all of which concern property or pecuniary matters with which the United States is directly concerned, and as its sixth and last objective, declares the purposes of the Act to be “to use all practicable methods compatible with the foregoing objectives to prevent improper payments and to detect and prosecute fraud.” (41 U.S.C.A. 101[a] to [f].) Other sections of the same Act relating to fraud uniformly use the word in its primary sense in reference to obtaining money or property from the government in connection with war contracts. (41 U.S.C.A. 107, 115[a], [b], 116[a], [b], 118[d], [e], 119.)

Section 19(b) of the Contract Settlement Act which is identical in pertinent part with the present Suspension Act—was one of the three interrelated sections which together made up an integrated scheme to detect and prosecute such frauds. Section 19(c)¹⁵ provided for civil remedies for those who

¹⁵Presently retained as 41 U.S.C.A. 119.

make false, fraudulent or fictitious claims or who engage in deceitful practices for the purposes of securing benefit, payment or other pecuniary values from the United States in connection with war contracts. Section 19(d) made applicable 18 U.S.C.A. 80 (now 18 U.S.C. 287 and 1001) with its criminal sanctions to any statement, representation, bill, receipt, and the like, made or caused to be made or used “for any purpose *under this chapter*”—that is, for any purpose having to do with war contracts involving property or pecuniary loss to the United States. Finally, Section 19(b) suspended the running of the statute of limitations in offenses involving defrauding or attempting to defraud the United States—that is, in its primary sense of causing the the United States pecuniary or property loss.

Similarly, the Surplus Property Act of 1944 states in its declaration of policy objectives which relate to pecuniary and property matters in which the United States is directly concerned. (41 U.S.C.A. 201 derived from 50 U.S.C.A. App. 1611). Other sections of that Act, relating to fraud, uniformly use the term in its primary sense as relating to obtaining money or property from the government in connection with surplus property transactions. (41 U.S.C.A. 239, formerly 50 U.S.C.A. App. 1635 [a] to [d].)

There is further internal evidence that the application of the Suspension Act must be limited to offenses involving pecuniary loss to the government. The last paragraph of 18 U.S.C.A. 3287 in which the Suspension Act is now found, reads:

“Definition of terms used in Section 103 of Title 41 shall apply to similar terms used in this section.”

Title 41 deals with and is entitled “Public Contracts”, and the key terms defined in Section 103 of that title are “prime contract”, “sub-contract”, “war contract”, “termination”, “material”, “government agency”, “contracting agency”, “termination claim”, “interim financing”, and “termination inventory”. These terms clearly speak of situations or transactions involving pecuniary dealings with the government and the reference to them in 18 U.S.C.A. 3287 must mean that the Suspension Act is operative only in situations involving such dealings.

The Revisers Note to 18 U.S.C.A. 3287 points out that this last paragraph of the Suspension Act “was added to obviate any possibility of doubt as to the meaning of terms defined in Section 103 of Title 41, U.S.C., 1940 ed., Public Contracts.”

The enactment of the Suspension Act in the context of the Contract Settlement and the Surplus Property Acts and a setting of payments, settlements, financing and disposal of property and other pecuniary values, confirms the conclusion that the “fraud” involved therein is fraud in its primary meaning.

If there remains any ambiguity as to the meaning of the word “fraud” in the Suspension Act, that ambiguity may be and is resolved by reference to its legislative history. (*United States v. American*

Trucking Association, 310 U.S. 534 [1940]; *Harrison v. Northern Trust Company*, 317 U.S. 476 [1943].)

In reporting out H.R. 6484, which became the Act of August 24, 1942, and was incorporated, as we have seen, without essential change in the Contract Settlement Act of 1944 and the Surplus Property Act of the same year, and thereby became the first clause of the present 18 U.S.C.A. 3287, both the House and the Senate Judiciary Committee left no doubt that the bill was aimed at suspending the running of the statute of limitations as to offenses involving defrauding or attempting to defraud the government in connection with war contracts let by government agencies for material and equipment and necessarily involved pecuniary or property loss, actual or attempted, to the United States.

The reports¹⁶ demonstrate that the necessity for such suspension arose out of the gigantic war program involving the expenditure by the government of huge sums of money in war contracts for material and equipment, the difficulty of discovering frauds in connection with these expenditures, and the necessary preoccupation of the law enforcement branch of the government with the enforcement of other laws, which prevented the investigation, discovery and prosecution of *this type of fraud* within the normal period of limitations. The legislative history of the Act of August 24, 1942 is searched in vain to find any intent to suspend the statute of limitations as

¹⁶See Appendix.

to offenses such as those charged in the indictment in the case at bar, which are entirely unrelated to war contracts and do not involve pecuniary or property loss to the government.¹⁷

Nothing in the legislative history or statutory context of the Contract Settlement Act of 1944, or the Surplus Property Act of that year, which made the formal amendments to the Suspension Act noted above, indicated any intention to alter the plain meaning of that Act as one relating to war contracts for material and equipment which necessarily involve pecuniary or property loss to the United States.¹⁸ On the contrary, the statutory context, as we have pointed out above, indicated an intention to reaffirm that meaning.¹⁹

¹⁷Representative Rankin of Montana had introduced a bill in 1941 calling for the wartime suspension of limitations on *all* federal offenses. Although she spoke in favor of such a broader coverage of the suspension statute when H.R. 6484 was before the House (88 Cong. Rec. 4759), her views were not followed and the Act with the more limited provisions here under consideration was adopted. (Norberg, *The Wartime Suspension of Limitations Act*, 3 Stanford Law Rev. [1951] 440, 451-452.) The remarks of Senator (now Mr. Justice) Burton, in presenting the bill to the Senate on behalf of the Judiciary Committee, also emphasized this limited scope of the suspension provided for. (88 Cong. Rec. 6160.)

¹⁸Similarly, nothing in the changes in phraseology which occurred when the Suspension Act became Section 3287 of the Revised Title 18 indicate any intention to modify its plain meaning.

¹⁹In *United States v. Bader*, 12 F. Supp. 922 (E.D. N.Y., 1935), the Court had occasion to examine the legislative history of the 1921 proviso, *supra*. The case involved a prosecution for aiding and abetting an unauthorized procurement of naturalization—substantially the offense charged in the third count of the indictment at bar. It was held that the statute of limitations of which the 1921 proviso was a part was not applicable to an offense under the Nationality Law. The Court, after examining the report of the House Committee on the Judiciary concerning the 1921 proviso (see Appendix) with its clear showing that Congress was seeking

B. THE CASES IN WHICH THE SUSPENSION ACT HAS BEEN HELD TO TOLL THE STATUTE OF LIMITATIONS ALL INVOLVE AN INTENT TO DEFRAUD THE UNITED STATES AND PECUNIARY LOSS TO THE UNITED STATES.

Only in cases where, under the statute defining the offense, intent to defraud was an essential ingredient of the crime and where there was an actual pecuniary loss to the United States, have the 1921 and 1926 provisos which were the predecessors of the Suspension Act been held to apply.

Thus, in *Bailey v. United States*, 13 F. (2d) 325 (9 Cir., 1926), in a prosecution for uttering and publishing a forged endorsement of a draft on the United States Treasury with intent to defraud the United States, the six-year period of limitations of the 1921 proviso was held applicable because, said the Court, "The defrauding of the United States is a statutory ingredient of the crime charged in the second count of the indictment, at least * * *"²⁰

Similarly, in *Weinhandler v. United States*, 20 F. (2d) 359 (2 Cir., 1927), cert. den. 275 U.S. 554 (1927), in a prosecution for the embezzlement of federal funds the six-year period of limitations of the 1921 proviso was held applicable because:

to reach wartime frauds which involved pecuniary or property loss to the Government, said that the conclusion was "irresistible" that such a proviso was not intended to supersede the provisions of the Nationality Code and its (then) five-year statute of limitations. That statute, of course, has been reduced to three years, and is now contained in 18 U.S.C. 3282.

²⁰Actually, the language of the Court was dicta, since the conviction was reversed on other grounds. (*Bailey v. United States*, *supra*, at 327.)

“The Supreme Court said in *Grin v. Shine*, 187 U.S. 189 * * * that ‘as the word “embezzled” itself implies fraudulent conduct on the part of the person receiving the money, the addition of the word “fraudulent” would not enlarge or restrict its signification. Indeed, it is impossible to embezzle the money of another without committing fraud upon him.’ Uttering and publishing a forged endorsement of a draft of the United States Treasury with intent to defraud the United States, is within the proviso. *Bailey v. United States* * * * In view of these authorities we hold that fraud is an element of the crime of embezzlement.” (*Weinhandler v. United States, supra*, at 361.)

The foregoing cases involved a direct and pecuniary loss to the government and the “defrauding” of the United States involved was a necessary ingredient of the offense charged.

Similarly, in *Falter v. United States*, 23 F. (2d) 420 (2 Cir., 1928), cert. den. 277 U.S. 590 (1928), defendants, government employees and others, were indicted for a conspiracy to defraud the United States by false statements to a government agency that contracts for goods had not been filled and that, therefore, the buyer was entitled in substitution to new disposable goods as they came in at prices fixed by the original contract, which prices were lower than the prices current at the time the substitute goods were delivered, thus depriving the government of the difference between the contract and the current price. The Court held the 1921 proviso applicable.

“The fraud was neither an intent nor the purpose of the crime as in *United States v. Noveck * * **, nor an offense against the revenue laws as in *United States v. McElvain * * ** The conspiracy to defraud was the crime and the crime consisted only in the fraudulent conspiracy.” (*Falter v. United States, supra*, at 426.)

But it must be noted that the very heart of this fraudulent conspiracy was the pecuniary loss to the government, e.g., the difference between the contract price and the current price of the substituted goods.

To like effect see:

Evans v. United States, 11 F. (2d) 37 (4 Cir., 1926) (a false claim for refund of a portion of excise taxes), where the Court, holding the 1921 proviso applicable, said:

“The evil which the statute was intended to reach was the obtaining of money from the United States by false pretenses.” (*Evans v. United States, supra* at 38.)

Miller v. United States, 24 F. (2d) 353 (2 Cir., 1928), cert. den. 276 U.S. 638 (1928) (a conspiracy to defraud the United States by allowing illegal claims without proper investigation for a pecuniary reward), where the Court held the 1921 proviso applicable, saying:

“The overt acts charged in furtherance of the conspiracy, and essential to the statutory crime of conspiracy, showed a consummated fraud as against the Government and the property rights of the United States * * * The conspiracy was

one, not merely to secure the allowance of claims, but to defraud the United States by procuring the payment of money and to transfer the bonds to the Swiss Corporation 'whereby the United States was to be and was defrauded of its possession and dominion of a large fund under its administration.' '' (*Miller v. United States, supra*, at 360-361.)

It is significant to note that in all of these cases the element of pecuniary or property loss to the United States was a necessary prerequisite to the application of the six-year period of limitations. Where such loss was not involved as an essential ingredient of the crime the three-year statute of limitations has been held to be a bar to the prosecution. (*United States v. Noveck, supra*; *United States v. Scharton, supra*; *United States v. McElvain, supra*; *Marzani v. United States, supra*; *United States v. Obermeier, supra*.)

No case has been found in which the statute of limitations was extended under the 1921 or 1926 provisos or was suspended under the Suspension Act (except possibly *United States v. Gottfried*, 165 F. (2d) 360 [2 Cir., 1948], cert. den. 333 U.S. 860 [1948], which is discussed in detail below), unless "defrauding" in the statute defining the offense was limited to its primary sense and necessarily involved pecuniary loss to the United States.

In the light of the language of the Suspension Act, of its context with the other sections in the setting of the Contract Settlement and Surplus Property Acts,

of the legislative history of the first clause of the Suspension Act, of the requirements of pecuniary or property loss to the United States in decisions under the analogous 1921 and 1926 provisos, and of the decisions in *Marzani v. United States* and *United States v. Obermeier, supra*, which we discuss in detail below, we submit that the Suspension Act employs "fraud against the United States" in its primary sense of cheating the government out of property or money and is therefore applicable to suspend the statute of limitations only where such fraud in this primary sense is an essential ingredient under the statute defining the offense.

C. THE ELEMENTS OF INTENT TO DEFRAUD THE UNITED STATES AND PECUNIARY OR PROPERTY LOSS TO THE UNITED STATES ARE NOT ESSENTIAL ELEMENTS OF THE CRIMES CHARGED IN THE INDICTMENT AT BAR.

(1) Count 1 of the Indictment.

The first count of the indictment is based upon 18 U.S.C. 371 which punishes in the alternative²¹ a conspiracy "to commit any offense against the United States" or a conspiracy "to defraud the United States". The indictment in this case is based upon the second alternative, e.g., the appellant is charged with having conspired to defraud the United States.

(a) Intent to defraud the United States.

It is not at all clear that intent to defraud is an essential element of this crime. (*United States v.*

²¹Norberg, *The Wartime Suspension of Limitation Act*, 3 Stanford Law Rev. 440, 445.

Stone, 135 F. 392 [D.N.J., 1905]; *Lisansky v. United States*, 31 F. (2d) 846 [4 Cir., 1929], cert. den. 279 U.S. 873 [1929]; *Holmes v. United States*, 134 F. (2d) [8 Cir., 1943], cert. den. 319 U.S. 776 [1943]; *Cannella v. United States*, 157 F. (2d) 470 [9 Cir., 1946].) However, since both intent to defraud the United States and the presence of pecuniary or property loss to the United States are essential elements of any offense to which it is sought to apply the Suspension Act, we pass this point by and consider whether or not there is present the element of pecuniary or property loss to the United States.

(b) Pecuniary or property loss to the United States.

It is self-evident and will be conceded by the government, we believe, that pecuniary or property loss to the United States is not an element of the crime charged in Count 1 of the indictment. In addition to the cases heretofore cited,²² other cases clearly establish that pecuniary or property loss to the government is not an essential element of the offense charged under the general conspiracy statute. (*Outlaw v. United States*, 81 F. (2d) 805 [5 Cir., 1936], cert. den. 298 U.S. 665 [1936]; *United States v. Harding*, 81 F. (2d) 563 [App. D.C., 1936]; *Braatelian v. United States*, 147 F. (2d) 888 [8 Cir., 1945]; *Heald v. United States*, 175 F. (2d) 878 [10 Cir., 1949], cert. den. 338 U.S. 859 [1949].)

²²*United States v. Keitel*, *supra*; *Haas v. Henkel*, *supra*; *Curley v. United States*, *supra*.

As a matter of fact, the trial Court so held in this very proceeding (*United States v. Bridges*, 86 F. Supp. 922, 927 [N.D. Calif., 1949].)

(2) Counts 2 and 3 of the Indictment.

(a) Intent to defraud the United States.

Counts 2 and 3 of the indictment are based upon 8 U.S.C.A. 746(a)(1) and 8 U.S.C.A. 746(a)(5) respectively. These statutes make it a crime knowingly to make a false statement under oath in a naturalization proceeding (Count 2) and to aid a person not authorized thereto to procure naturalization (Count 3).

It is perfectly clear that in neither case is specific intent to defraud the government an essential element of the offense and the few litigated cases on the point have so held, declaring that the falsehood itself or the aiding itself constitute the crime irrespective of the element of the specific intent to defraud. (*Holmgren v. United States*, 156 F. 439 [9 Cir., 1907], aff. 217 U.S. 509 [1910]; *Roberto v. United States*, 60 F. (2d) 774 [7 Cir., 1932]; *United States v. Fotie*, 137 F. (2d) 831 [8 Cir., 1943].)

(b) Pecuniary or property loss to the United States.

Here, too, it is self-evident that pecuniary or property loss to the United States is not and cannot be an element of the offenses created by the statutes upon which the second and third counts of the indictment are based. There is no reference to property loss to the government in either the statutes involved

or the indictment itself, nor of course was there any in the proof offered at the trial. Again, the trial court held as much in this very case. (*United States v. Bridges*, 86 F. Supp. 922, 927 [N.D. Calif., 1949].)

Since the Suspension Act is applicable only when both intent to defraud the United States and pecuniary or property loss to the United States are present in the offenses involved, and since the offenses involved in this case do not embrace these elements, the Suspension Act is not applicable to this proceeding.

D. THE COURT BELOW ERRONEOUSLY CONCLUDED THAT THE SUSPENSION ACT WAS APPLICABLE TO THIS PROSECUTION.

Despite the foregoing, the Court below adopted the government's contention that the Suspension Act tolled the operation of the statute of limitations with respect not only to the first count but also to the second and third counts "on the general theory that fraud is implicit in each count". (*United States v. Bridges*, 86 F. Supp. 922, 927 [N.D. Calif., 1949].)

The difficulty with the Court's position is that it failed properly to analyze the statute before it—a statute suspending, *in certain limited cases*, the operation of a general statute of limitations. It attempted to dispose of the problem of limitations solely upon the basis of its conclusions concerning the substantive elements of the offenses.

- (1) The trial Court erroneously applied *United States v. Gilliland* to the case at bar.

The trial Court, placing heavy reliance²³ upon *United States v. Gilliland*, 312 U.S. 86 (1941), concluded that pecuniary loss to the government is not an element of the substantive offenses here charged against appellants. The trial Court thought erroneously that this was dispositive of the question before it. For from that conclusion the trial Court proceeded to another conclusion—that the absence of pecuniary loss to the government has no effect upon the applicability of the Wartime Suspension of Limitations Act to the case. That is where the trial Court made its fatal error.

The trial Court confused a consideration of the substantive elements of the crime with a consideration of the criteria which determine the applicability of a given statute of limitations. It failed to recognize that while an indictment might state facts sufficient to constitute an offense against the United States (even in the absence of allegations of pecuniary loss to the government), the prosecution still might have been commenced at a date subsequent to the expiration of the applicable period of limitations. The validity of the indictment as a matter of pleading does not determine the timeliness of the prosecution.

For this very reason the trial Court's reliance upon *United States v. Gilliland*, *supra*, was clearly misplaced since no question of limitations was there

²³See *United States v. Bridges*, 86 F. Supp. 922, 927 (N.D. Calif., 1949).

involved. That case involved a demurrer to an indictment charging a violation of the False Claims Act.²⁴ The demurrer was based upon the ground that the indictment did not state facts sufficient to constitute an offense since there was no pecuniary loss to the government alleged. The Supreme Court held that since pecuniary loss to the government was not an element of the offense under the False Claims Act, the demurrer had been improperly sustained.²⁵ When Chief Justice Hughes used the language quoted by the trial Court, he was discussing *the substantive elements of the crime* created by the False Claims Act. He found, primarily because of its legislative history, that the language of the False Claims Act was sufficiently broad to embrace fraudulent representations made to any agency of the government without restriction to cases involving financial loss to the government. As a matter of fact, he recognized that it was the purpose of the legislation to protect the government from deceptive practices whether or not there was pecuniary loss.²⁶ Chief Justice Hughes was not concerned with the question of the outlawing of the prosecution by the operation of the statute

²⁴For the pertinent provisions of that Act, see *infra*.

²⁵Parenthetically it is interesting to observe that involved in the *Gilliland* case were false statements with respect to petroleum production which clearly involved fraud having pecuniary roots.

²⁶This effort of the Chief Justice to apply the statute in such a way as to carry out its manifest purpose is consistent with what we have said above concerning the duty of the Court to carry out the manifest purpose—but not to go beyond the manifest purpose—of the Wartime Suspension Act, and with what we shall say below concerning the duty of a court to carry out the manifest purpose of the recodification of Title 18 and the reduction of the statute of limitations (18 U.S.C.A. 3287) to three years.

of limitations since that question did not exist in the case.²⁷

It is clear from a reading of the opinions of the District Court and the Supreme Court²⁸ that the only question involved was the applicability to a certain set of facts of a statute *creating a substantive offense*, and the only thing the case held was that the facts alleged in the indictment were sufficient *to state an offense* against the United States under the statute even though it was not alleged that there was a pecuniary loss to the government. There was no plea that the prosecution was barred by the statute of limitations.

It is elementary, of course, that there is a vast distinction between these two questions: (a) does a pleading state a cause of action—or in the case we are considering, does an indictment state facts sufficient to constitute an offense; and (b) has the action—

²⁷The Supreme Court described the District Court's holding as follows:

"The district court held that these *substantive* counts *did not state an offense* under Section 35 of the Criminal Code * * *"
(*United States v. Gilliland*, *supra*, at 89.)

The District Court described the demurrer upon which it had ruled as follows:

"Defendants have filed a lengthy demurrer, attacking the indictment on numerous grounds, which may be summarized under the following headings: (1) that the facts alleged in all counts *do not charge offenses* against the United States; (2) all counts are too vague and indefinite to enable the defendants to plead thereto; and (3) in any event, the facts alleged in counts 2 to 11 inclusive are insufficient to bring them within the purview of section 80 of Tit. 18 U.S.C. * * *" (*United States v. Gilliland*, 35 F. Supp. 181, 182 [E.D. Texas, 1940].)

²⁸The case went to the Supreme Court on direct appeal since it involved the District Court's construction of a statute. (18 U.S.C.A. [old] 682 [now 18 U.S.C.A. 3731].)

in this case a criminal prosecution—been commenced within the period permitted by the applicable statute of limitations. Clearly it is possible to answer the first question in the affirmative and the second in the negative. All that the *Gilliland* case did, or could have done, was to answer the first question in the affirmative. It did not and could not have dealt with the second question.

The second question, of course, is the precise question which is involved in this case and upon its resolution the government's position on the applicability of the Wartime Suspension Act must stand or fall.

The cases which dealt exclusively with the second question, *United States v. Noveck*, 271 U.S. 201 (1926); *United States v. McElvain*, 272 U.S. 663 (1926); *United States v. Scharton*, 285 U.S. 518 (1932); and *Marzani v. United States*, 168 F. (2d) 133 (App. D.C., 1948), affirmed by a divided Court in 335 U.S. 895, were barely considered by the trial Court, and to the extent that they were, were put to one side by reliance upon *United States v. Gottfried*, 165 F. (2d) 360 (2 Cir., 1948), cert. den. 333 U.S. 860 (1948). *United States v. Obermeier*, 186 F. (2d) 243 (2 Cir., 1950), cert. den. U.S., 71 S. Ct. 573, 95 L. ed. 452 (1951), which also dealt exclusively with the statute of limitations question, had not been decided when the trial Court ruled. It is to this series of cases we shall now direct our attention.

- (2) The trial Court erroneously failed to apply *Marzani v. United States* to the case at bar.

In *Marzani v. United States, supra*, the defendant was indicted under the False Claims Act (18 U.S.C.A. [old] 80) which made it a crime "knowingly and wilfully * * * [to] make * * * any false or fraudulent statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States." The offense charged was that when Marzani was interrogated by representatives of the Civil Service Commission and the Federal Bureau of Investigation concerning his eligibility for federal employment, he falsely denied membership in the Communist Party.

The indictment in Marzani's case was returned more than three years after the commission of the offenses alleged in nine counts of an eleven-count indictment. His motion to dismiss those nine counts upon the ground that a prosecution thereunder was barred by the statute of limitations was denied by the trial Court which sustained the government's contention that the Suspension Act tolled the operation of the statute of limitations.

The Court of Appeals for the District of Columbia unanimously held:

"* * * The first nine counts of this indictment were barred by the statute of limitations, and the defendant's motion that they be dismissed should have been granted." (*Ibid.*, 168 F. (2d), at 137.)

The Court, after reciting the facts outlined above, correctly stated that the question before it was whether the Suspension Act applied to offenses under the False Claims Act.²⁹ This is the analogue of the issue in the case at bar: does a statute of limitations bar the prosecution; not, does the indictment state facts sufficient to constitute an offense against the United States.

The court in the *Marzani* case did not concern itself with the question of whether because of the absence of pecuniary loss to the government the indictment did not state an offense under the False Claims Act. That question had been removed from its considera-

²⁹For the sake of ready comparison we quote the significant language of the False Claims Act and the language of the statutes under which the indictment in this case was drawn:

FALSE CLAIMS ACT

“* * * Whoever shall knowingly and wilfully * * * make * * * any *false* or *fraudulent* statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined,” etc.

COUNT 1

18 U.S.C. 371

“If two or more persons conspire * * * to *defraud* the United States or any agency thereof in any manner or for any purpose * * * each shall be fined”, etc.

COUNT 2

18 U.S.C. 1015

“Whoever knowingly makes any *false* statement under oath in any case * * * relating to naturalization * * * shall be fined”, etc.

COUNT 3

8 U.S.C.A. 746(a) (5)

“It is hereby made a felony for any * * * person * * * to encourage * * * any person not entitled thereto to obtain * * * any * * * certificate of naturalization * * * knowing the same to have been procured by *fraud*.”

tion by *United States v. Gilliland, supra*. The only question before it was, irrespective of whether the indictment stated facts sufficient to constitute an offense against the United States, did the statute of limitations bar the prosecution. That is the precise question we are here considering.

Having correctly recognized the issue before it, the Court of Appeals said, and we quote the following at length because it is completely dispositive of the government's contentions and of the trial Court's opinion in this respect:

"We see no escape from the conclusion impelled by two decisions of the Supreme Court, *United States v. Noveck* [1926, 271 U.S. 201, 46 S. Ct. 476, 70 L. Ed. 904]³⁰ (and its companion cases, *United States v. McElvain* [1926, 272 U.S. 633, 47 S. Ct. 219, 71 L. Ed. 451] and *United States v. Scharton* [1932, 285 U.S. 518, 52 S. Ct. 416, 76 L. Ed. 917]) and *United States v. Gilliland* [1941, 312 U.S. 86, 61 S. Ct. 518, 85 L. Ed. 598].

"In *United States v. Noveck*, the question was whether a statute which read, 'That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, * * * the period of limitation shall be six years', [42 Stat. 220 (1921), 18 U.S.C.A. § 582] applied to perjury in an income tax return. The indictment alleged that the perjury was for the 'purpose of defrauding the United States.' The Supreme Court held that the six-year statute did not apply,

³⁰Bracketed citations and matter, here and throughout this quotation, are the Court's footnotes.

because defrauding the United States is not an element of the crime of perjury. The language of that statute of limitation is the same as that of the Suspension statute here involved; in fact, that statute was the predecessor to this one.

“In *United States v. McElvain*, *supra*, the Court held that the six-year statute of limitations involved in *United States v. Noveck* did not apply to a conspiracy to defraud the United States by making a false income tax return. In *United States v. Scharton*, *supra*, the indictment was for an attempt to evade taxes by falsely understating taxable income. The defendant pleaded the statute of limitations. The United States contended that attempts to obstruct or defeat the lawful functions of any department of the Government, if accompanied by dishonest methods, are attempts to defraud the United States. The Court held that the six-year limitation applicable to offenses involving the defrauding of the United States, was not applicable to the offense described in that indictment. [Other cases referred to in the briefs in this connection are *Bailey v. United States*, 9 Cir., 1926, 13 F. 2d 325; *Weinhandler v. United States*, 2 Cir., 1927, 20 F. 2d 359, certiorari denied 1927, 275 U.S. 554, 48 S. Ct. 116, 72 L. Ed. 423; and *Falter v. United States*, 2 Cir., 1928, 23 F.2d 420, certiorari denied 1928, 277 U.S. 590, 48 S.Ct. 528, 72 L.Ed. 1003. In the *Bailey* case, the court held that defrauding the United States was a statutory ingredient of the offense of uttering and publishing a forged indorsement to a Government check with intent to defraud the United States. In the *Weinhandler* case, the court held that the fraud is an element of the crime of

embezzlement, and that, therefore, the six-year limitation in the 1921 proviso applied. In the *Falter* case, the court held that a conspiracy to commit a civil fraud is a crime under the conspiracy statute.]

* * * * *

“It necessarily follows, in our view, that the Suspension Act does not apply to offenses under the False Claims Act. The Supreme Court has clearly said (1) that a statute identical in pertinent part with the Suspension Act does not apply to offenses of which defrauding the United States in a pecuniary way is not an essential ingredient; and (2) that such defrauding of the United States is not an essential ingredient of offenses under the False Claims statute.³¹ If perjury on an official document required to be filed under a federal statute, the making of false income tax returns and an attempt to evade taxes are not defrauding the United States within the meaning of a statute of limitations, we do not see how making a false statement in the course of an inquiry into one’s qualifications for federal employment can be.³²

“The contention of the Government is that the *Gilliland* case, *supra*, merely held that an inten-

³¹“Such [e.g., ‘in a pecuniary way’] defrauding of the United States” is clearly not an essential ingredient of the offenses described by the indictment here in question or under the statutes here in question. (See *supra*.) The trial Court so held—and mistakenly thought that the holding disposed of appellant’s argument on the statute of limitations. As a matter of fact this holding makes absolutely imperative the conclusion that the Suspension Act is *not* applicable here and clearly distinguishes this case from *United States v. Gottfried*, 165 F.2d 360 (2 Cir., 1948), cert. den. 333 U.S. 860 (1948).

³²Nor do we see how making a false statement in the course of an inquiry into one’s qualifications for citizenship can be either.

tion to swindle or defraud the Government, resulting in property or pecuniary loss, is not an element of proof under the False Claims Act; and that that Act retained, after its amendment, 'all its essential fraud characteristics', that 'the conception of fraud against the United States formerly expressed in the statute' was retained by the 1934 amendment. It says that a false statement made in a matter within the jurisdiction of an agency of the United States '*necessarily* [italics in Government's brief] involves a fraud.' The gist of the Government's contention is stated thus: 'However, where an offense violative of the second clause involves "knowingly and wilfully" making "false and fraudulent statements," the statute (recognizing the intrinsically wilful and fraudulent element in the very nature of the acts proscribed) does not require the government to establish proof of (a) intent to defraud, or (b) pecuniary or property loss to the United States. Hence, the essential fraud elements continue as a constant in Section 80, although the accidental language has changed insofar as "intent of cheating and swindling or defrauding" found in the Act of October 23, 1918, may have varied the form rather than the substance of the offense.'

"The difficulty with the foregoing contention is that it ignores the plain rulings in *Noveck* and kindred cases. Those cases involved false statements, under oath. The offense tended to obstruct, by dishonest means, the operation of a department of the Government. The court held that the Suspension Act (actually an identical predecessor) does not apply to such offenses. *So that*

even if the False Claims Act does involve the sort of fraud the Government says it does, the Suspension Act does not apply; the rulings in the Noveck and similar cases related to precisely that same sort of fraud. Despite the vigor and skill with which the Government's contention is pressed upon us by its counsel, we can see no escape from the conclusion. It follows that we are of opinion that the first nine counts of this indictment were barred by the statute of limitations, and the defendant's motion that they be dismissed should have been granted." (*Ibid.*, at 136-137.)

The legislative history of the Wartime Suspension statute (see *supra*) makes it clear that the Court of Appeals for the District of Columbia correctly interpreted the congressional intent in holding that that statute of limitations was suspended only in cases where the intent to defraud was present and involved a pecuniary loss to the Government.

This legislative history make it clear that congressional concern was over the fact that in the necessity of executing wartime contracts and of obtaining as quickly as possible war supplies and materials, the Government would not have the opportunity carefully to scrutinize contracts and that the contractors would or could take advantage of the Government's preoccupation with the war effort to practice frauds upon it. Under those circumstances, and for that limited purpose, *and for no other purpose*, Congress suspended the operation of the statute of limitations insofar as wartime frauds were concerned. It is clear that Congress never intended to suspend the operation

of the statute of limitations for all crimes in general or even for all frauds in general. Therefore, even conceding for the sake of argument that the crimes described in the indictment here are "frauds", it is clear that the statute of limitations as to them has not been suspended.

Finally, the Court of Appeals for the District of Columbia correctly recognized that a suspension statute, being in derogation of a general statute of limitations, must be strictly construed and should not be given any scope or effect broader than that which is necessary to achieve its limited purpose. See *infra*.

In *United States v. McElvain*, 272 U.S. 633 (1926), cited by the Court of Appeals in the *Marzani* case, the Supreme Court was considering the problem in relation to an indictment which charged *conspiracy to defraud* the United States in respect of its internal revenue laws by the filing of false income tax returns. This case is even more significant than *United States v. Noveck*, *supra*, or *United States v. Scharton*, *supra*, since it involved a *conspiracy to defraud* which is precisely what is alleged in the first count of the indictment herein. The Court nonetheless reached the same conclusion that it had in the *Noveck* case, saying:

"The proper application of the proviso is to be found upon a consideration of its scope as compared with that of the original section having regard to the statutes of limitation. Section 1044 is comprehensive in language and purpose; it relates to all crimes, excepting only capital offenses and those arising under the revenue and slave trade laws. The purpose of the added proviso was

to carve out a special class of cases. It is to be construed strictly, and held to apply only to cases shown to be clearly within its purpose. *United States v. Dickson*, 15 Pet. 141, 165; *Ryan v. Carter*, 93 U.S. 78, 83.

“The proviso relates to substantive offenses involving defrauding or attempts to defraud the United States, whether committed by one or more or by conspiracy or otherwise. It does not extend to any offenses not covered by Section 1044. The crime of conspiracy to commit an offense is distinct from the offense itself. *The language of the proviso cannot reasonably be read to include all conspiracies defined by Section 37.*³³ But if the proviso could be construed to include any conspiracies, obviously it would be limited to those to commit the substantive offense which it covers.”³⁴ (*Ibid.*, 272 U.S. at 639.)

Similarly the Suspension Act (of which the proviso referred to by the Court was the predecessor) must be construed strictly and be held to apply only to cases shown to be clearly within its purpose—which is not the case at bar; and it cannot be read (as the trial Court read it) to include all conspiracies, even all conspiracies to defraud. Clearly something more

³³The section referred to was the general conspiracy statute (later 18 U.S.C.A. [old] 88) which is identical in all material respects with 18 U.S.C. 371 upon which the first—or the conspiracy—count of this indictment is based. Specifically it embraced conspiracies “to defraud the United States in any manner or for any purpose”.

³⁴That is, conspiracies to commit crimes of which fraud in its primary sense is an essential ingredient and which involve therefore pecuniary loss to the Government. (*Supra*, pp. 80-87.) The substantive offenses at bar are not such crimes. (*Supra*, pp. 92-95.)

is required to be shown before the normal statute of limitations may be suspended. That, as we have shown, is the presence of an intent to defraud the United States in a situation involving a pecuniary or property loss to the Government.

As its opinion in the *Marzani* case shows, the pertinent Supreme Court decisions were carefully considered by the Court of Appeals for the District of Columbia. That Court, of course, had no alternative but to follow the logic and reasoning of the Supreme Court on the point. This it did in a carefully considered and well-reasoned opinion which not only analyzed the Supreme Court decisions in great detail but which gave careful attention to the Government's contentions, going so far as to quote pertinent portions of the Government's brief in its opinion, and stating the reasons why it was unable to follow those contentions. Those contentions, of course, are identical with the ones here made by the Government, and in this case, followed by the District Court. We submit that the logic of the Court of Appeals, based squarely on the Supreme Court decisions, which required the rejection of the Government's contention in the *Marzani* case similarly requires its rejection here.

Since the decision of the trial Court, the Court of Appeals for the Second Circuit has decided a case which, if possible, is even more akin to the case at bar than is the *Marzani* case. In *United States v. Obermeier*, 186 F.2d 243 (2 Cir., 1950), cert. den. U.S., 71 S.Ct. 573, 95 L. ed. 452 (1951), the de-

fendant was charged with a violation of 8 U.S.C.A. 746(a)(1) in that he made a false statement concerning his alleged membership in the Communist Party in his petition for naturalization. The nature of the charge, as well as the section upon which it is based, is exactly identical with the situation presented by the second count of the indictment at bar, and is of course in all material respects identical with the situation presented by the first and third counts of the indictment in the case at bar.

In the *Obermeier* case the indictment as to two of its three counts was returned more than three but less than five years after the commission of the alleged crime. This is exactly identical with the situation at bar as to all counts. In reversing the conviction on the two counts which were thus barred by the statute of limitations, the Court of Appeals for the Second Circuit considered the Government's contention that the Wartime Suspension Act preserved its right to prosecute the action and disposed of this contention very briefly in the following language:

“The government contends, however, that, in any event the War Time Suspension of Limitations Act preserved its right to prosecute this action. That Act, so far as pertinent, is substantially the same as the Acts interpreted by the Supreme Court in *United States v. Noveck* * * * *United States v. McElvain* * * * and *United States v. Scharton* * * *. As so interpreted, it suspends a statute of limitations only when fraud or attempted fraud against the United States (or one of its agencies) ‘is an ingredient under the

statute defining the offense,' and does not, absent such a statutory definition, apply to perjury or false swearing, even when the United States is directly interested. * * * Nothing in 8 U.S.C.A. §746(a)(1), under which defendant was indicted, makes fraud an ingredient of the crime.

"Accordingly, we reverse as to the first two counts, * * *" (186 F.2d at 256-257.)

- (3) The trial Court erred in its reliance upon *United States v. Gottfried*, since that case is not apposite to the situation at bar.

The case urged by the Government and cited by the trial Court, *United States v. Gottfried*, 165 F.2d 360 (2 Cir., 1948), cert. den. 333 U.S. 860 (1948), is not controlling for at least four reasons, three of which were apparent when the trial Court made its ruling here. In the first place, it dealt with a different statutory offense from the ones here involved. In the second place, on its facts it is clearly distinguishable from the case at bar. If there ever was a justification for giving the Suspension Act any elasticity at all, then the facts of the *Gottfried* case presented such a situation. In the third place, the learned judge who wrote the opinion was demonstrably in error with regard to the history of the statutes that he was considering. Finally, the *Gottfried* case has been distinguished, if not actually cast aside, by *United States v. Obermeier, supra*.

- (a) The offense involved in the *Gottfried* case was different from those here involved.

Gottfried and others were charged with a violation of 18 U.S.C.A. (old) 80 and 88: with the making of

a fraudulent statement "in a matter affecting the administration of the Office of Price Administration" and with a conspiracy to defraud the United States "by depriving it of the services of Stanton, an investigator in the Office of Price Administration". The offenses here involved were no part of the *Gottfried* case. Under these circumstances, "the value of the (*Gottfried*) opinion as a precedent in the *Bridges* case is open to question."³⁵

(b) The *Gottfried* case cannot be controlling because its facts are so different from those at bar.

More important, with respect to its facts, the *Gottfried* case is almost a direct antithesis to the case at bar, just as the *Marzani* and *Obermeier* cases are almost its perfect parallel. In the *Gottfried* case the offense, as described in the Court's own language, was as follows:

"Gottfried's company made and sold Pepsi-Cola, Hire's root-beer and other 'soft drinks' at Ellenville, New York; and in order to do so it bought and used large quantities of sugar. Under the regulations existing at the time—1942—the amount allowed to the company in each year depended upon the amount which it had used in 1941, and which it was obliged to enter upon an official form provided for the purpose. Although Gottfried did not actually fill out the form in this instance, he signed it, and he was aware at the time that it exactly doubled the quantity of sugar which the company had used in 1941. The statement was filed on April 29, 1942, with the Office

³⁵Norberg, *The Wartime Suspension of Limitations Act*, 3 Stanford Law Rev. 440, 445 (1951).

of Price Administration, which about a year later—in March, 1943—received an anonymous letter declaring that it was false. The Office thereupon detailed the defendant, Stanton, to check it by examining the company's records; Stanton went to its office on March 19th and saw Long, its president, who told him to come back in a few days. Long thereupon called up Gottfried in New York, and later at an interview Gottfried told him 'that his sugar base was inflated,' and 'that he was into it up to his neck.' Gottfried thereupon by telephone set about 'trying to find some one who could help him' and was finally recommended to the defendant, Forman, a lawyer, who lived in Kingston. Later, Gottfried told Long to visit Forman, and at their interview Forman said that the matter could be arranged, but that it would cost \$1500. On Sunday, the 28th, the three met at the Hotel Pierre in New York in an interview at which it was finally agreed that Forman should have \$1500, as he demanded; and the next day Gottfried gave Long the cheque of his wife for that sum, which Long cashed at Ellenville, and paid Forman \$1450 out of the proceeds. (What happened to the other \$50 is not altogether clear, but later Forman received a company cheque for that amount.) At some date which was in sharp dispute Stanton appeared at Ellenville, and with Long made a pretended examination of the records. He accepted figures read off to him by Long without personally examining the records, and put them down on an adding machine. They equalled the amount in the statement which, as we have already said, exactly doubled the amount bought in 1941. This came about because Long at Gottfried's direction pro-

cured duplicate invoices of all the sugar which the company had bought during that year, and read both the originals and the duplicates. Stanton reported to his superiors in the Office of Price Administration in Albany that the statement was correct, and for this Forman paid him \$200." (Ibid., 165 F.2d at 362-363.)

These facts show how the Government was defrauded by cheating it in connection with the distribution of a vital wartime staple and by the bribery and corruption of one of its agents. If there ever was a case that in the absence of direct pecuniary loss to the Government might be regarded as coming within the legislative purpose of the Wartime Suspension Act, this clearly is such a case. What was involved in the *Gottfried* case was the operation of a wartime agency set up for the purpose of controlling the distribution of a commodity essential to the successful prosecution of the war. The defendant defrauded that agency and lined his own pockets with his gain. It is true that the money which he procured in this illegitimate fashion did not come directly from the treasury of the United States—it came merely from the people of the United States in their capacity as consumers. Furthermore, when his crime was about to be uncovered he procured the bribery of a Government agent. Conduct of this sort could be detrimental to, if not destructive of, the war effort. Clearly it was the kind of conduct which might not be detected during a period of war and therefore is the kind of conduct which a Court could legitimately conclude Congress

intended to hold open for subsequent investigation and prosecution even after the normal three-year period had run.³⁶

Bridges' case, like *Marzani's* and *Obermeier's*, had no relationship to the war effort. *Bridges'* case was a simple naturalization. The fact that it occurred during the war rather than before or after the war was a pure accident. The situation did not arise out of the war, as did *Gottfried's*. In *Gottfried's* case, there would not have been an offense, nor could there have been a situation in which the offense could have arisen, but for the existence of the war. The whole price control and rationing program was part of the war effort.

The vast factual differences between the two situations must compel a close scrutiny before the conclusion of *Gottfried's* case is applied to *Bridges'*. Particularly must this be so when there are the well-reasoned and authoritative precedents of *Marzani's* and *Obermeier's* cases in *Bridges'* favor on this point—precedents based upon facts which are indistinguishable from the facts of *Bridges'* case.

(c) The court in the *Gottfried* case clearly committed at least two demonstrable errors.

First, it apparently failed to recognize that different criteria apply to a consideration of the substan-

³⁶ "Besides, the purpose of the Amendment [the Suspension Act] was not to let crimes pass unpunished which had been committed in the hurly-burly of war, an overriding motive which perfectly fits the situation at bar." (*Ibid.*, 165 F.2d at 368.)

tive elements of an offense and to a consideration of the applicability of a statute of limitations,³⁷ for it decided the statute of limitations question on the basis of its understanding of the law with respect to the meaning of the word “fraud” in the substantive criminal statute:

“* * * it has been the law, at least since 1910, that in the statute [§ 80, Title 18 U.S.C.A.]³⁸ under which this indictment was drawn, ‘fraud’ includes any conduct, ‘calculated to obstruct or impair its [the United States’] efficiency and destroy the value of its operations and reports.’ [Haas v. Henkel, 216 U.S. 462, 479.] *We see no reason for reading the words ‘defrauding the United States’ in the statute of limitations now in question less comprehensively * * **” (*Ibid.*, 165 F.2d at 368.)

The reasons why the Court should have read the words “defrauding the United States” in the Suspension Act less comprehensively than it would have read those words in the other statute are discussed *supra* at pages 96-99. Irrespective of the meaning of the words in the other statute, the words in the Suspension Act clearly were intended to apply only where intent to defraud was an essential ingredient of the crime and where there was involved a pecuniary or property loss to the United States. The Court’s equation of the meaning of the words in two separate statutes undoubtedly resulted from the fact that its cursory

³⁷See discussion, *supra*.

³⁸Bracketed material in this quotation are the Court’s footnotes.

examination³⁹ of the legislative history of the Suspension Act convinced it that the case before it *ought to have been* included within the scope of that Act.

“* * * the purpose of the amendment was not to let crimes pass unpunished which had been committed in the hurly-burly of war, an overriding motive *which perfectly fits the situation at bar.*”⁴⁰ (*Ibid.*, 165 F.2d at 368.)

A more careful examination of the legislative history would undoubtedly have convinced the Court that whether or not the case before it *ought to have been* included within the scope of the Suspension Act, *it was not.*

Second, the Court was demonstrably in error in citing *Haas v. Henkel, supra*, as authority for the statement that it has been the law since 1910 that fraud in the False Claims Act has a meaning not restricted to pecuniary or property loss. The pertinent sections of the False Claims Act were not enacted until October 23, 1918 (C. 194, 40 Stat. 1015); and until 1934 those sections were limited in applica-

³⁹We say “cursory examination” with deference to the Court for it failed to refer either to the Committee reports appended hereto as an appendix, to the genesis of the Suspension Act, to the relationship between it and the War Contract Settlement Act, the Surplus Property Act, and Title 41 (Public Contracts). Its failure to do so may be accounted for by the fact that Title 18 had not yet been recodified and the legislative material now so easily found in the Revisor’s Notes was not then so readily available. Also the Court failed to refer to the Supreme Court cases—*Noveck, Scharton* and *McElvain*—which placed the Suspension Act in its proper historical and legislative perspective.

⁴⁰Of course, the *Bridges* case, as we have pointed out, does not fit into this picture at all.

tion to false statements involving pecuniary or property loss to the United States. (See *United States v. Cohn*, *supra*, and *United States v. Gilliland*, *supra*.) The error is of no consequence with respect to the construction of the False Claims Act which is not involved here but it is of great consequence in connection with the construction of "defrauding" as employed in the Suspension Act which is involved here.

The Court of Appeals in the *Gottfried* case fell into the same error as the trial Court in this case by failing to refer to the Supreme Court's construction of "defrauding" in the 1921 and 1926 provisos in the *Noveck* and kindred cases—a construction which limited the applicability of those identical predecessors to the Suspension Act to offenses in which the intent to defraud in a pecuniary sense was an essential element. Both the Court of Appeals in the *Gottfried* case and the trial Court below failed to refer to the reenactment in the present Suspension Act of the pertinent identical language of the 1921 and 1926 provisos after such restrictive interpretation by the Supreme Court. Both Courts failed to refer to the House and Senate Committee reports on the Act of August 24, 1942, which specifically referred to the 1921 proviso and indicated that the present Suspension Act was designed to fulfill the same purpose in connection with the huge governmental expenditures of money during the war. Both Courts based their holdings primarily upon the construction of "defrauding" in the general conspiracy statute which

includes the words "or for any purpose" and carried over that construction to the Suspension Act in which those words of broadening scope are lacking. We submit that in the light of all the factors mentioned above, which both the Court of Appeals in the *Gottfried* case and the trial Court below ignored, such a construction of the Suspension Act is totally unwarranted. On the contrary, the construction of the Suspension Act by the Court of Appeals for the District of Columbia in the *Marzani* case which took into consideration the factors mentioned above, is the only construction which is possible.

(d) The Court which decided it has since distinguished the *Gottfried* case from the situation here presented.

The Court of Appeals for the Second Circuit has, since the ruling of the Court below, distinguished the *Gottfried* case by its decision in *United States v. Obermeier*, 186 F.2d 243 (2 Cir., 1950), cert. den. U.S., 71 S.Ct. 573, 95 L.ed. 452 (1951).⁴¹ In the *Obermeier* case the Court followed the interpretation given to the Suspension Act in the *Noveck*, *Scharton* and *McElvain* cases, *supra*, and said that the statute of limitations was suspended "only when fraud or attempted fraud * * * 'is an ingredient under the statute defining the offense * * *'" (*Ibid.*, 186 F.2d at 257.) It followed this statement with a footnote reference to *Gottfried v. United States*—the only refer-

⁴¹L. Hand, C.J., who wrote the *Gottfried* opinion, was one of the bench which decided the *Obermeier* case.

ence in the entire opinion to the *Gottfried* case. The reference reads:

“In *U. S. v. Gilliland*, 312 U. S. 86, the offense was so defined as to make fraud an ingredient. So, too, in *Gottfried v. U. S.*, 165 F.(2d) 360 (C.A. 2) as we there interpreted the statute creating the crime.” (*Ibid.*, 186 F.2d at 257 ftnt. 64.)

The Court here couples the *Gottfried* case with *United States v. Gilliland*, *supra*, which as we have already pointed out deals only with the question of the substantive elements of a cause of action and not with the question of the outlawing of a cause of action by the operation of the statute of limitations. The Court's use of the words “as we there interpreted *the statute creating the crime*” with reference to the *Gottfried* case, indicates that the present view (and the correct one, we submit) of the Court of Appeals for the Second Circuit is that fraud was an ingredient of the statute defining the offense in the *Gottfried* case and therefore (and *only* therefore) was the Suspension Act applicable in that case. Since fraud is not an ingredient of the offenses at bar, the reasoning of the *Obermeier*, and not the *Gottfried* case is controlling.

E. CONCLUSION AS TO THE APPLICABILITY OF THE SUSPENSION ACT.

From all of the foregoing it appears that reliance upon the Suspension Act to save this prosecution and to take it out of the operation of the three-year statute of limitations is not well-founded. The legis-

lative history and judicial interpretation of the Suspension Act establish that that Act tolls the operation of the statute of limitations only where intent to defraud the United States and the presence of pecuniary or property loss to the United States are essential elements of the offenses involved. The foregoing elements which must be present to make the Suspension Act operative are not present with respect to any of the counts of the indictment in this case. The Court below erred in interpreting and applying the Suspension Act because of its reliance upon cases which are not germane and because of its failure to give effect to the cases which are dispositive of the issue.

II.

SECTION 21 OF THE ACT OF JUNE 25, 1948, DOES NOT "SAVE" THIS PROSECUTION FROM THE OPERATION OF THE STATUTE OF LIMITATIONS.

The Act of June 25, 1948, created the present Title 18 of the United States Code. Section 21 of that Act⁴² provides for the repeal of specifically enumerated statutes which were deemed inconsistent with the provisions of the new code and declares that:

“Any rights or liabilities now existing under such sections or parts thereof [i.e., the statutes repealed] shall not be affected by this repeal.”

Prior to the enactment of Title 18, the statute of limitations in the Nationality Code was five years

⁴²*Supra.*

(8 U.S.C.A. 746[g]); this five-year period of limitations was expressly repealed by Section 21. The precise issue here is whether the quoted language operates to preserve to the Government the five-year period of limitations within which to prosecute for the offenses charged under Counts 2 and 3 of the indictment.⁴³

In a decision squarely in point the Court of Appeals for the Second Circuit has held that Section 21 does not have that effect. (*United States v. Obermeier*, 186 F.2d 243 [2 Cir. 1950], cert den. U.S., 71 S. Ct. 573, 95 L.ed. 452 [1951].) In that case the defendant was indicted for violating 8 U.S.C. 746(a) (1)—the identical offense charged in the second count of the indictment at bar—in that he falsely stated under oath in the course of a naturalization proceeding that he had not been a member of the Communist Party. “His sole defense to these counts is that the indictment was barred by the statute of limitations” (*Ibid.*, 186 F.2d at 250), the indictment having been returned more than three but less than five years after the offenses were committed. The decision of the Court of Appeals for the Second Circuit carefully considers the legislative history and background of the several statutory provisions involved, the judicial interpretations given to words of like import, and other relevant matters—from all of which it concludes that the language of Section 21 did not preserve to

⁴³Section 21 does not apply in any event to Count 1 of the indictment since both before and after the recodification of 1948 the period of limitations for the offense there described was three years.

the Government the five-year period within which to prosecute for the offense in question.

An independent examination of the considerations which impelled the Court of Appeals for the Second Circuit to reach its conclusion in the *Obermeier* case serves only to reenforce the correctness of its views.

In order to determine the issue raised by the Government's contention it is necessary to review the legislative history of the revision of which Section 21 is a part, the legislative history of the three-year statute of limitations (18 U.S.C. 3282), and the legislative history of Section 21 itself. Such a review demonstrates clearly that Congress did not intend to include statutes of limitations in the saving clause. Furthermore, the application of usual rules of statutory construction to the language used in Section 21 demonstrates that Section 21 cannot save this prosecution from the effect of the statute of limitations.

A. THE LEGISLATIVE HISTORY OF THE REVISION OF THE CRIMINAL CODE OF THE UNITED STATES.

Title 18 of the United States Code, the revision of the entire body of federal criminal law and procedure, was the result of years of exhaustive and painstaking work on the part of special committees of lawyers and judges appointed by the Congress and the Judiciary Committee of both its houses. Serving on and with these committees were, among others, Senator (now Attorney General) McGrath, Floyd E. Thompson, former Chief Justice of the Illinois Supreme Court; Justin Miller, formerly of the Court of Appeals for

the District of Columbia; John T. Cahill, former United States Attorney for the Southern District of New York; George F. Longsdorf, member of Advisory Committee on Federal Rules of Criminal Procedure; and Alexander Holtzoff, special assistant to the Attorney General (now a United States District Judge in the District of Columbia).

All of these authorities, in consultation with the bench, bar, and law schools throughout the country, worked on the revision. On June 25, 1948, the revision was enacted and became effective on September 1, 1948.

At the Congressional hearings concerning this legislation⁴⁴ statements were made which demonstrate Congressional purpose:

Representative Robison:

“One of the real main purposes of this act is to cut out the obsolete laws, acts that have been repealed by a special revision of some measure through the Congress, or have been repealed or come to an end by their own terms; and then to get these laws in better shape, to build up a code of 50 titles, the two most important of which the experts, those in our high courts, and our lawyers, say are titles 18 and 28.

* * * * *

“We hope that we are going to have all the laws properly classified and properly titled, so that we can turn to them quickly and easily and so that

⁴⁴Which was coupled with the legislation codifying the new Judicial Code, i.e., 28 U.S.C.

they will be understandable, not only to the judges and the lawyers but to laymen.

“The Supreme Court has felt so much concerned about the matter that they appointed a committee to cooperate in this revision. Many of the judges of our Federal circuit courts, the courts of appeal, the American Bar Association—every one has had a hand in these matters.”⁴⁵

Representative Devitt:

“In these two bills the laws have been rewritten in direct and simple language. Hundreds of obsolete and irrelevant provisions are eliminated and will be repealed. Uncertainty will be ended, and constant references to the Statutes at Large will no longer be necessary. If enacted these bills will make the contents positive law as distinguished from *prima facie* evidence of the law. It will undoubtedly be to the great benefit of the courts, lawyers, lawmakers, and the general public that these revisions receive congressional approval in order to make our statute law a systematic and orderly arrangement of congressional action.”⁴⁶

Representative Keogh:

“We selected 18 and 28, Mr. Chairman, for the reason that those were the two titles that by our experience and information cried out the loudest for a revision and for a restatement and for pos-

⁴⁵Hearings before the Subcommittee No. 1 of the House Judiciary Committee on H.R. 1600 and H.R. 2055, March 9, 1947. (United States Code, Congressional Service, 80th Cong., 2d Sess., p. 2687.)

⁴⁶*Ibid.*, p. 2688.

sible enactment into positive law, and we selected those two titles, too, particularly for the reason that there was pending under the acts granting the authority to the Supreme Court and its advisory committees, the adoption of the rules of civil procedure and of criminal procedure, and we proceeded upon the hypothesis that the adoption of such rules would necessarily require substantive revision of the then existing laws.”⁴⁷

Justin Miller:

“As the work went forward, I found myself reading the drafts prepared by the editors from two other points of view as well: First, that of the judge, who is frequently engaged in interpreting and applying the sections of the Criminal Code; second, as a trial lawyer, hunting for the law applicable to particular cases.

“I may say that I was for 4 years a prosecuting attorney, so I had particular interest in that respect.

“As a judge I was concerned with simplification and clarification of language, the removal of ambiguities, uncertainties, duplication, redundancy, and conflict. To the achievement of this objective the editorial board was conscientiously and effectively alert.”⁴⁸

The Department of Justice which instituted and is pressing this prosecution, participated in the revision of Title 18. Fred E. Strine, of the Department's Criminal Division, testified:

⁴⁷*Ibid.*, p. 2691.

⁴⁸*Ibid.*, pp. 2697-2698.

"I should add to what Mr. Baynton has said regarding H. R. 1600 that the Department is in favor of a codification of the various titles of the United States Code, and H. R. 1600 is a very important one. Since the criminal laws have not been codified since 1909, a revision of title 18 is probably overdue and the early enactment of this bill would be very advantageous from our standpoint, I believe."⁴⁹

Various other witnesses were heard to the same effect: That the purpose of the revision was to remove obsolete statutes, rewrite the law in simple, direct language, make it uniform, and end uncertainty.⁵⁰

This impressive legislative history⁵¹ demonstrates that the purpose of the Congress in enacting the new Title 18, of which the three-year statute of limitations

⁴⁹*Ibid.*, p. 2721.

⁵⁰Judge Albert B. Maris, United States Circuit Judge for the Third Circuit, testified to the participation of a committee of judges from his circuit in these revisions. The hearings also demonstrate that the joint editorial staffs of the West Publishing Company and the Edward Thompson Company cooperated in the revision under authority of the Congress.

Among others who were heard from were Professor James William Moore of Yale Law School; William W. Barron, Chief Revisor, West Publishing Company; Judge John B. Sanborn, United States Circuit Judge for the Eighth Circuit; Walter P. Armstrong, former President of the American Bar Association; Harvey T. Reid, Editor-in-Chief of the West Publishing Company; Leland Tolman of the Administrative Office of the United States Courts; Charles J. Zinn, Law Revision Counsel, Committee on the Judiciary; and Judge John J. Parker, United States Circuit Judge for the Fourth Circuit.

House Report No. 304, 80th Congress, First Session, dealing with revision of Title 18, describes the purpose of the new title and the background of the revision. Generally the report follows the testimony of the witnesses just quoted. (*Ibid.*, pp. 2434, *et seq.*)

⁵¹*Ex parte Collett*, 337 U.S. 55 (1949); *United States v. National City Lines*, 337 U.S. 78 (1949).

(18 U.S.C. 3282) is an integral part, was to place, insofar as humanly possible, between the covers of one volume all the law relating to crimes and criminal practice in the Federal Courts so that all persons—judges, lawyers, Government counsel and even laymen—could with certainty know and understand what the criminal law of the United States was.

In the face of such a legislative history, heed must be given, in applying any particular section, to the over-all legislative purpose. Clearly no one section of the Code is to be applied in a manner which will destroy or undermine the harmony which Congress intended to create or which will restore the uncertainties which Congress intended to remove.

It has long since been regarded as an elementary rule of statutory construction (even apart from such a legislative history) that all sections of a statute are to be construed together for the purpose of giving effect to the entire act. (*Constanzo v. Tillinghast*, 287 U.S. 341 [1932]; *United States v. American Trucking Associations*, 310 U.S. 534 [1940]; *Great Northern Ry. Co. v. United States*, 315 U.S. 262 [1942]; *United States v. Dotterwich*, 320 U.S. 277 [1943]; *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 [1945].)

In *Brown v. Duchesne*, 19 How. 183 (1857), the Court said:

“* * * it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole

statute (or statutes on the same subject) and the objects and policy of the law as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature, as thus ascertained, according to its true intent and meaning.” (*Ibid.*, in 15 S.Ct. at 599.)

In *Ozawa v. United States*, 260 U.S. 178 (1922), the Court said:

“It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look into the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.” (*Ibid.*, at 194.)

In *Helvering v. New York Trust Co.*, 292 U.S. 455 (1934), the Court said:

“* * * the expounding of a statutory provision strictly according to the letter without regard to other parts of the act and legislative history would often defeat the object intended to be accomplished.” (*Ibid.*, at 464.)

Thus, when it appears, as here, that Congress in enacting Title 18 intended to establish one uniform and harmonious body of criminal law for the United

States, then the words in any one clause—including a saving clause—must be construed (if “construction” is needed) so as to give effect to the over-all intent and purpose of Congress and not to destroy it. It is hardly conceivable that Congress, having gone to such pains to enact a uniform criminal code, proposed to undo all of its work by the saving clause in a subsidiary section of the statute.

**B. THE LEGISLATIVE HISTORY OF 18 U.S.C.A. 3282—THE
THREE-YEAR STATUTE OF LIMITATIONS.**

As far as 18 U.S.C.A. 3282 is concerned, there is really no problem of statutory interpretation or even need for recourse to legislative history, since the Court is not called upon to construe or interpret language which is clear and unambiguous. (*Osaka Shosen Kaishi Line v. United States*, 300 U.S. 98 [1937]; *Continental Casualty Co. v. United States*, 314 U.S. 527 [1942]; *Packard Motor Car Co. v. National Labor Relations Board*, 330 U.S. 485 [1947]; *Ex parte Collett*, 337 U.S. 55 [1949].)

Thus, when a statute of limitations provides that no person shall be prosecuted for an offense unless the indictment is found “within three years next after such offense shall have been committed”, and when it is clear that the indictment was not so found, that ought to end the matter. True, the statute in question has a qualification, “except as *expressly* otherwise provided by law * * *” But this is of no avail to the Government unless it can establish that there is an

express provision of law otherwise—not a provision by implication or inference.⁵²

No “express” provision otherwise than a three-year period of limitations appears anywhere in the new Title 18 which could conceivably govern this case. The only express reference to any period of limitations in excess of three years relating to the offenses alleged in the indictment is the *expressed repeal*⁵³ of 8 U.S.C.A. 746(g), the five-year statute of limitations of the old Nationality Code. (*United States v. Obermeier, supra*, at 250.)

However, should there be any question about the literal meaning of the words of 18 U.S.C.A. 3282, its legislative history demonstrates that it alone governs the case at bar and that its three-year limitation is controlling.

Most significant in that regard is the fact that the revisers who were acting on behalf of the Congress made it clear that they consciously intended to do away with the five-year statute of limitations found in the old Nationality Code and that they consciously

⁵²“Expressly” is defined to mean “with definite, stated intent or application; exactly and unmistakably; in direct terms. (Funk & Wagnall’s *New Standard Dictionary*, 1920 ed.) “Express” is defined to mean “made known distinctly and explicitly, and not left to inference or implication * * * manifested by direct and appropriate language * * * The word is usually contrasted with ‘implied.’” (Black’s *Law Dictionary*, 1933 ed.)

⁵³Act of June 25, 1948, c. 645, 80th Cong., §21. (United States Code, Congressional Service, 80th Cong., 2d Sess., p. 2423.)

and deliberately reduced the period of limitations to three years.

In this connection the reviser's notes following 18 U.S.C.A. 3282 are indeed significant. We quote them in full.

“Section 3282—Section Revised

“*Based on section 746(g) of title 8, U.S.C. 1940 ed., Aliens and Nationality, and on title 18, U.S.C., 1940 ed., §582 (R.S. §1044; Apr. 13, 1876, ch. 56, 19 Stat. 32; Nov. 17, 1921, ch. 124, §1, 42 Stat. 220; Dec. 27, 1927, ch. 6, 45 Stat. 51; Oct. 14, 1940, ch. 876, title I, subchap. III, §346(g), 54 Stat. 1167).*

“Section 582 of title 18, U.S.C., 1940 ed., and section 746(g) of title 8, U.S.C., 1940 ed., Aliens and Nationality, *were consolidated*. ‘Except as otherwise expressly provided by law’ was inserted to avoid enumeration of exceptive provisions.

“The proviso contained in the act of 1927 ‘That nothing herein contained shall apply to any offense for which an indictment has been heretofore found or an information instituted, or to any proceedings under any such indictment or information,’ was omitted as no longer necessary.

“*In the consolidation of these sections the 5-year period of limitation for violations of the Nationality Code, provided for in said section 746(g) of title 8, U.S.C., 1940 ed., Aliens and Nationality, is reduced to 3 years. There seemed no sound basis for considering 3 years adequate in the case of heinous felonies and gross frauds against the United States but inadequate for misuse of a passport or false statement to a naturalization examiner.*”

Thus it is clear⁵⁴ that Congress intended that *all* prosecutions on and after the effective date of the new Title 18 to be governed by the three-year statute of limitations. Furthermore, it intended the three-year limitation to apply to the Nationality Code as well as to all other laws, and it specifically intended *to reduce*, from five to three years, the statutory period within which prosecutions could be brought for violations of that code. Whatever may be the Court's views as to the heinousness of the offenses here charged or as to how long the Government ought to have to prosecute for offenses of this nature, Congress has clearly indicated its view that three years is ample and that if the Government fails to act within that period of time, the prosecution is barred.

Such a deliberate legislative effort to provide for a uniform period of limitations with respect to all crimes must be respected by this Court. It is not conceivable that the objective thus sought to be achieved could be frustrated by a strained construction or interpretation of the words of Section 21. Furthermore, an examination of the history as well as the language of Section 21 shows that such a result is not necessary.

**C. THE LEGISLATIVE HISTORY OF SECTION 21 OF
THE ACT OF JUNE 25, 1948.**

The legislative history of Section 21 itself indicates that it was not enacted to upset the over-all legislative

⁵⁴ "The reviser's notes are so obviously authoritative in perceiving the meaning of the Code, that the Government itself * * * refers to them in its brief in this case." (*United States v. National City Lines*, 337 U.S. 78 at 81 [1949].) See also *Stainback v. Ho Hock Ke Lok Po*, 336 U.S. 368 at 376, *ftnt.* 12 (1949).

purpose. It was enacted for a specific purpose which can be given effect without disturbing the harmony which the balance of the Act sought to establish.

As William W. Barron, the chief reviser of Title 18, said, Section 21 of the Act,

“* * * provides for the specific repeal of hundreds of sections enumerated in the Schedule of Laws Repealed. These include all laws incorporated in the revision, plus many superseded and obsolete criminal laws. The schedule was carefully checked and rechecked many times. *This method of specific repeal will lift from the courts the onerous task of ferreting out implied repeals.*”⁵⁵

And as Charles J. Zinn, General Counsel for the Committee on the Revision of Laws, said:

“* * * we have a complete repeal provision * * * in which we specifically repeal all existing law which is incorporated in the new code.

“Now, that is most important. Heretofore, in the preparation of the codification of laws, there have been indefinite repeal provisions to the effect that all laws or parts of laws in conflict therewith are hereby repealed. That is an incomplete job. They leave it up to the courts to decide what laws are repealed.

“In this bill, we have set up a new section of the bill * * * listing chronologically all of the laws which we repeal.”⁵⁶

⁵⁵Hearings before the House Committee on the Revision of the Laws on H.R. 5450, December 6, 1944. (United States Code, Congressional Service, 80th Cong., 2d Sess., p. 2669.)

⁵⁶*Ibid.*, p. 2701.

Thus it is clear that Section 21 was not enacted in order to bring back into the criminal law and procedure that which had been repealed and was inconsistent with the other portions of Title 18, among which other portions was included the all-embracing three-year statute of limitations contained in §3282. On the contrary, the purpose of §21 was to remove from the Courts the necessity of engaging in judicial construction or of implying or construing or inferring what Congress intended. Its purpose was to specify what was being repealed⁵⁷ and to leave no doubt on that score, to the end that in the statute itself the statutory purpose would be realized, and to prevent the frustration of the legislative intent which sometimes results from the judicial process of “ferreting out implied repeals”.

Thus, §21 itself must be construed—if “construed” it must be—in a manner consistent with the avowed objectives of the entire revision. It must not be seized upon as a handle to negate what Congress sought to do in the balance of the Act. Specifically, it must not be used to undo what Congress did in 18 U.S.C. 3282—i.e., consciously and deliberately fix a three-year statute of limitations for the very crimes involved in this proceeding.

D. THE WORDS USED IN SECTION 21 HAVE NO APPLICATION TO STATUTES OF LIMITATIONS.

We have already pointed out that it is an elementary rule of statutory construction that an enactment

⁵⁷Which included, as we have pointed out, the five year limitation of the Nationality Code.

must be treated as a harmonious whole, that words are not to be torn from their context and given a meaning which would destroy the over-all purpose which the legislature intended, and that, where necessary, the literal meaning of words must be sacrificed in order to achieve this beneficent purpose. (*Ozawa v. United States, supra.*)

Here it is not necessary to sacrifice the literal meaning of words since traditionally statutes of limitations have never been regarded as either "rights" or "liabilities". Such statutes provide neither a "right" nor do they impose a "liability". They simply prescribe the period during which rights may be asserted or liabilities imposed; of themselves they create neither rights nor liabilities.

In *Riddlesbarger v. Hartford Insurance Co.*, 7 Wall. 386 (1869), it was said of such statutes:

"They do not confer any right of action. They are enacted to restrict the period within which the right, otherwise unlimited, might be asserted."
(*Ibid.*, in 19 S.Ct. 259.)

If statutes of limitation "do not confer any right of action", they clearly do not and cannot impose any "liability". If there is no "right" conferred on the one side, there is no "liability" imposed on the other. (*Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 [1944]; *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 [1945]; *Holmberg v. Armbracht*, 327 U.S. 392 [1946]; *Kavanagh v. Noble*, 332 U.S. 535 [1947].)

Lovely v. United States, 175 F.2d 312 (C.C.A. 4, 1949), cert. den. 338 U.S. 834 (1949), cited to the Court below in support of the Government's position on this point, is not germane. In that case the question was whether Section 21 "saved" a *punishment* provided for in the old code—and which was reduced by the new Title 18—in the case of a prosecution begun under the old code and in which sentence was pronounced after the new code went into effect. It is perfectly clear that the word "liability" in Section 21 has reference to punishment since a punishment has been traditionally regarded as a "liability".⁵⁸ Furthermore, in that case the proceeding was commenced before the effective date of the new Title 18 and the matter was *sub judice* when the new Title 18 went into effect. Here Title 18, with its three-year statute of limitations, had been the law of the land for some nine months before the Grand Jury returned the indictment.

The Court of Appeals in the *Obermeier* case, basing itself clearly upon the adjudicated cases relating to periods of limitations rather than to punishment, held:

"* * * a statute of limitations is considered no part of a 'right' or 'liability', but as affecting the remedy only. On that basis it has been held

⁵⁸"To be liable to a fine is to be punishable by a fine." (*United States v. Cobb*, 163 Fed. 791, 793 [D.C. Md., 1906].)

"* * * this word 'liability' is intended to cover every form of punishment to which a man subjects himself * * *" (*United States v. Ulrici*, 28 Fed. Cas. No. 16,594 at p. 329 [D.C. Mo. 1875].)

(See also *United States v. Chouteau*, 102 U.S. 603 [1881], and *Huntington v. Attrill*, 146 U.S. 657 [1892].)

that until the expiration of the period named in such a statute, the period may validly be lengthened or shortened by a later statute, and that where no criminal liability is involved the legislature may revive a right barred by a former statute of limitations. In other words * * * a limitation statute establishes no vested substantive right or unalterable substantive liability. We know, of course, that the words 'substance,' 'procedure,' and 'remedies' have no fixed, invariant, meanings, and that what they signify depends upon the particular context. We think, however, that, for the reasons we have canvassed, the context of 1 U.S.C. §109 and §21 of the 1948 Act show that they were not intended to include, in 'rights' or 'liabilities,' statutes of limitation." (*United States v. Obermeier, supra*, at 254-255.)

Since a statute of limitations creates neither a right nor confers a liability, Section 21 does not apply to 18 U.S.C.A. 3282.

E. ENACTING SECTION 21 IS NOT THE PROPER WAY TO SAVE A PERIOD OF LIMITATIONS; CONGRESS KNEW THE PROPER METHOD BUT DID NOT USE IT IN THIS CASE.

When Congress specifically desired or intended to enable the Government to prosecute subsequently committed crimes within a period fixed by an earlier statute of limitations, it made its purpose crystal clear by the language it used in the saving clause.

The Court of Appeals in the *Obermeier* case, *supra*, cites examples of legislation which demonstrate that Congress did not consider statutes of limitations saved by general savings clauses using such words as "any

liability" (R.S. §13) or "offenses" (R.S. §5598), but recognized the necessity of enacting separate sections to achieve the desired end—sections which used such precise language as "all acts of limitation" (R.S. §5599),⁵⁹ (*United States v. Obermeier, supra*, at 251-253).

This type of legislation was carried forward into 1 U.S.C.A. 110, which provides as follows:

"All acts of limitation, whether applicable to civil causes and proceedings, or to the prosecution of offenses, or for the recovery of penalties or forfeitures, embraced in the Revised Statutes and covered by the repeal contained therein, shall not be affected thereby, but suits, proceedings, or prosecutions, whether civil or criminal, for causes arising, or acts done or committed prior to said repeal, may be commenced and prosecuted within the same time as if said repeal had not been made."

This statute shows that when Congress intended to save acts of limitation it knew that the best and most unambiguous way to do so was to say so in just so many words.

It might appear at first blush that 1 U.S.C.A. 110 is an answer to the entire argument with respect to the "saving" of the five-year statute of limitations. However, §110 merely applies to statutes of limitations "embraced in the Revised Statutes", and the

⁵⁹The Court also points out that legislation recognizing the same distinction between "criminal offenses" and statutes of limitations was carried forward into §§533 and 534 of the Criminal Code of 1909 (34 Stat. 1159).

five-year statute of limitations which was found in §746(g) of Title 8 was never part of the Revised Statutes⁶⁰ having been enacted as §24 of the Act of June 29, 1906 (34 Stat. 603), whereas the Revised Statutes were enacted in 1873.⁶¹

Some legislation contains language broad enough to save both substantive rights and liabilities and their remedies, including statutes of limitations. For example, in the Nationality Code of 1940, the Congress said:

“For the purpose of the prosecution of all crimes and offenses against the naturalization or citizenship laws of the United States which have been committed prior to the date when this chapter shall go into effect, *the existing naturalization and citizenship laws* shall remain in force and effect.” (8 U.S.C.A. 746[h].)

Had Congress intended either to save remedies by a separate section dealing with such matters, as distinguished from §21 dealing with “rights or liabilities” or by combining remedies with rights and liabilities as it did in the Nationality Code of 1940, it would have been easy for it to have said so. (See *United States v. Obermeier*, *supra*, at 255, particularly footnote 57.)

⁶⁰See *United States v. Obermeier*, *supra*, at 253.

⁶¹As a matter of fact, at one time the Attorney General of the United States suggested to Congress that in his opinion §110, which saved “all acts of limitation * * * embraced in the Revised Statutes”, ought to be broadened so that acts of limitations found in other statutes would also be saved. Congress rejected this suggestion and refused to broaden the provisions of §110. See *United States Code* (1940 ed.), 1 U.S.C. 29(a) and notes following.

F. CONCLUSION AS TO THE INAPPLICABILITY OF SECTION 21
OF THE ACT OF JUNE 25, 1948.

From all of the foregoing it appears that reliance upon §21 of the Act of June 25, 1948, to save prosecution under the second and third counts of the indictment and to take it out of the operation of the three-year statute of limitations, is not well-founded. The legislative history of Title 18 in general, of 18 U.S.C. 3282, and of §21 itself, as well as the rules of statutory construction, will not permit such a construction. The traditional significance of the word "liabilities" is directly to the contrary of such a construction. A comparison of this section with other Congressional "saving clauses" demonstrates that Congress did not here use the words of broad scope it has used on other occasions to achieve a more comprehensive result.

III.

EXCEPTIONS TO STATUTES OF LIMITATIONS MUST BE
STRICTLY CONSTRUED AGAINST THE GOVERNMENT AND
LIBERALLY CONSTRUED IN FAVOR OF THE ACCUSED.

It must be remembered that the argument of the Government in connection with §21 of the Act of June 25, 1948, as well as in connection with the Suspension Act, *supra*, is in effect an effort to carve out an exception from the general statute of limitations. For the reasons we have heretofore urged, we contend that such an exception cannot properly be carved out at all. Even if it could, we call the Court's attention

to the well-established rule that statutes of limitations are statutes of repose which are intended to operate for the benefit of an accused and that they must always be strictly construed against the Government.

United States v. McElvain, 272 U.S. 633 (1926), involved an indictment for conspiracy to defraud the Government with respect to its internal revenue by conspiring to file false income tax returns. The indictment was returned more than three years but less than six years after the commission of the alleged offenses. There was a general three-year statute of limitations but there was also a proviso for a six-year period of limitations in certain cases. With respect to the Government's argument that the proviso rather than the general statute applied, the Court said:

"The purpose of the added proviso was to carve out a special class of cases. It is to be construed strictly and held to apply only to cases shown to be clearly within its purpose." (*Ibid.*, at 639.)

Here, as we have shown above, the purpose of §21 was to eliminate the necessity of "implied repeals" and was not to upset the harmony which was sought to be created by the enactment of the new Title 18. Clearly, §21 must be limited to "cases shown to be clearly within its purpose." (*United States v. Dickson*, 15 Pet. 141 [1841]; *Ryan v. Carter*, 93 U.S. 78 [1878]; *United States v. Noveck*, 271 U.S. 201 [1926].)

This rule of construction applies not only to statutes of limitations but to all criminal statutes.

In *United States v. Chemical Foundation, Inc.*, 272 U.S. 1 [1926]), the Supreme Court said of a penal statute:

“[It] is not to be extended to cases not clearly within its terms or to those exceptional to its spirit or purpose.” (*Ibid.*, at 18.)

And in *Giles v. United States*, 84 F.2d 943 (5 Cir., 1936), the Court said:

“It is settled law that criminal statutes are to be strictly construed and may not be extended by implication unless that is clearly demanded by their terms.” (*Ibid.*, at 945.)

See also:

United States v. One Airplane, 23 F.2d 500 (S.D.Calif., 1927), and

United States v. Obermeier, *supra*, at 256, ftnt. 59.

IV.

CONCLUSION.

We have demonstrated above:

1. That the Wartime Suspension Act is not applicable to this prosecution since the offenses here charged do not involve as essential elements thereof either the intent to defraud the United States or pecuniary or property loss to the United States, and since the presence of both of these elements is required before the Suspension Act can come into play. This conclusion is compelled by the legislative history

and judicial interpretation of the Suspension Act and its predecessors. It is further compelled by the interpretation of the Suspension Act by the Courts of Appeals in the *Marzani* and *Obermeier* cases. The effort to apply the *Gottfried* case to the case at bar cannot be sustained.

2. That § 21 of the Act of June 25, 1948, does not save the prosecution for the Government. The legislative history of the revision of Title 18 and of the three-year statute of limitations contained in § 3282 of that title, as well as of § 21 itself, compels such a conclusion as does the judicial interpretation of the meaning of the words used in § 21. Furthermore, it is clear that in enacting § 21, Congress used words of narrow scope and import, whereas on other occasions when it intended to preserve to the Government a prior statute of limitations it deliberately chose words of broader meaning and significance to achieve the end desired. Finally, the comments of the revisers on § 3282 make it clear that it was the legislative intent to reduce, as of the effective date of the new Title 18, the period of limitations to three years for the very crimes charged in the second and third counts of the indictment.

3. To the foregoing considerations must be added the fact that we are here dealing with a statute of limitations whose beneficent purpose should be accomplished by the Court. The Government, in seeking to carve out from the general statute of limitations exceptions and provisos, has a heavy burden which it has clearly failed to meet. Such exceptions and pro-

visos are, of course, always strictly construed against the Government and the general statute of limitations is always liberally construed in favor of the accused.

POINT II.

APPELLANT BRIDGES WAS DENIED DUE PROCESS OF LAW BY THE SUCCESSION OF PROCEEDINGS AGAINST HIM CONCERNED WITH THE SAME ISSUE OF FACT.

(Specification of Errors 7, 8, 9, 11, 12, 13, 14, 19, 20.)

Appellant Bridges has twice been subjected to deportation proceedings¹ involving the same charges and raising the same issues as are involved in and raised by the indictment in this case. Since there is an identity of the scope and issues of the deportation proceedings and the present criminal proceeding, there is here applicable that principle of law "which seeks to bring litigation to an end and to promote certainty in legal relations". (*United States v. Munsingwear, Inc.*, 340 U.S. 36 [1950].)

During the litigation which followed the second deportation proceeding the question here raised was not squarely passed upon by the Supreme Court since the decision went off upon other grounds. However, that Court, as we shall see below, indicated quite clearly that legal standards normally applicable to criminal cases were equally applicable in deportation proceedings.

¹As we have pointed out above, he was, prior to the deportation proceeding, subjected to a series of administrative investigations covering the same subject matter.

In the second deportation proceeding, the District Court² and this Court³ both thought that the 1940 amendment to the deportation statute served to extend the period into which the inquiry might be had, thus making the charge against Bridges broader and different in the second deportation case from what it was in the first. Be that as it may,⁴ it is clear that the charge against him in this case is identical with the charge against him in the second deportation case.

The essence of the case against Bridges in both deportation proceedings and in the present case was that at some time since his entry into the United States in 1920, he joined or became affiliated with the Communist Party.⁵ The parties to the proceeding were always the same.⁶ The type of evidence given

²*Ex parte Bridges*, 49 F. Supp. 292, 297 (D.C. Calif., 1943).

³*Bridges v. Wixon*, 144 F.2d 927, 936 (9 Cir., 1944).

⁴This view will not bear analysis. With respect to Bridges' relationship to the Communist Party, the question of whether the offenses in the two deportation proceedings were different is a question which calls for a practical and not a theoretical approach. (*Murphy v. United States*, 285 F. 801 [7 Cir., 1923]; *Wong Sun v. United States*, 293 F. 273 [6 Cir., 1923]; *Short v. United States*, 91 F.2d 614 [4 Cir., 1937].) It is not the theory expressed in the Government's formal charge but the evidence introduced which determines the question. (*Mathews v. United States*, 19 F.2d 7 [3 Cir., 1927]; *Ex parte Gagliardi*, 284 F. 190 [D.C. Wash., 1922].) If substantially the same offense is involved in both cases, exoneration at the first hearing is a bar to the second; and this result cannot be avoided by varying the phraseology of the pleadings (*Franklin v. North Weymouth Coop. Bank*, 283 Mass. 275 [1933]), by alleging violations of additional or amended statutes (*Ex parte Gagliardi, supra*), or by introducing evidence of different overt acts as proof of the same offense. (*Short v. United States, supra*.)

⁵In the present case, the question of affiliation is not directly involved.

⁶The moving party in every instance was the United States of America, and the defendant in every instance was Harry Renton Bridges.

at all three hearings was the same, and its purpose in each instance was to prove Communist Party membership. The period covered by the testimony in all three cases was the same. It is not claimed by the Government that the testimony before Judge Foley is false by reason of any conduct or activities of Bridges subsequent to the decision of the Supreme Court in *Bridges v. Wixon, supra*. In no practical sense can the offenses charged in the deportation proceedings and in the present case be regarded as different from each other.

The evidence introduced in the present criminal case would have supported a deportation order under the law as it stood at the time of either one of the prior proceedings. Where the same proof would support either charge, the identity of charges is established (*In re Nielsen*, 131 U.S. 176 [1889]; *Carter v. McClaghry*, 183 U.S. 365 [1902]; *Burton v. United States*, 202 U.S. 344 [1906]; *Ebeling v. Morgan*, 237 U.S. 625 [1915]; *Tricito v. United States*, 4 F.2d 664 [5 Cir., 1925]; *Bertsch v. Snook*, 36 F.2d 155 [5 Cir., 1929]).

Viewed from the standpoint of the issues as framed by the charge made and the defense employed, the conclusion must be the same. At the time of the first hearing, two types of defense were legally available to an alien denying the proscribed relationship: (a) although he had once been a member or affiliate of the alleged subversive organization, the relationship had ceased to exist before the date of his

arrest; or (b) he had never been a member or affiliate of the organization.

The first deportation case was defended by Bridges on the theory that he had never been a member of the organization in question. The effect of the 1940 amendment to the Naturalization Act which was passed before the second deportation warrant was issued, was to remove the first defense above-mentioned. Therefore, as a matter of law as well as a matter of actual record, the second deportation proceeding involved only one defense, to-wit, that Bridges had never been a member of the Communist Party. That was the only defense open to him.

That is the precise defense which he raised in the instant criminal proceeding and is the only issue involved in this proceeding. Thus, the question of whether or not Bridges had ever been a member of the Communist Party is the only issue of fact which was tried and litigated in the present criminal case in the second deportation case, and in the first deportation case.

An issue of fact⁷ litigated and determined at one proceeding and essential to a decision therein, is conclusive between the parties hereto and in a subsequent proceeding, even though a different claim is involved (*United States v. Munsingwear, Inc.*, *supra*; *United States ex rel. Harshman v. Knox County*, 122

⁷“The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps for the ground work upon which it must have been founded.” (*Burlen v. Shannon*, 99 Mass. 200, 203 [1868].)

U.S. 306 [1887]; *Ex parte Gagliardi, supra*). There is certainly no practical difference between the range of inquiry or the factual issues involved in any of the three proceedings.⁸

Both the Government and the trial court thought an important distinction existed because different witnesses were used in the criminal case than were used in either of the deportation proceedings.⁹ That fact is plainly immaterial. The protection against relitigation of the same issues cannot be nullified by bringing forward new evidence in a subsequent proceeding upon the factual issues which were involved in the former proceeding.

The Supreme Court has said:

“The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, has there been such determination, and not upon what evidence or by what means was it reached.” (*Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683, 691 [1895].)

⁸The Board of Immigration Appeals in the second deportation case recognized that this was true with respect to the relationship between the two deportation cases themselves, despite the amendment to the Naturalization Act, *supra*, and, citing *Wong Chow Gin v. Cahill*, 79 F.2d 854 (9 Cir., 1935), and *Wong Kam Chang v. United States*, 111 F.2d 707 (9 Cir., 1940), said:

“* * * there is a serious question whether an administrative agency should relitigate time after time the same *factual* issues in the same type of proceeding.” (*In re Harry Renton Bridges*, Before the Board of Immigration Appeals, Jan. 3, 1942, p. 52.)

⁹As a matter of fact, in his cross-examination (Tr. 5300), and in his argument to the jury (Tr. 7789), the chief Government prosecutor made much of the fact that none of the witnesses called in this criminal case had appeared in either of the prior proceedings.

And again:

“The estoppel resulting from the thing adjudged does not depend on whether there is the same demand in both cases, but exists, even although there may be different demands, when the question upon which the recovery of the second demand has, under identical circumstances and conditions, been previously concluded between the parties or their privies.” (*City of New Orleans v. Citizens Bank*, 167 U.S. 371, 396 [1897].)

Furthermore:

“* * * even newly discovered evidence does not prevent the application of res judicata. Many, perhaps a majority, of the cases in which the doctrine of res judicata is enforced are cases in which facts have been discovered after the adjudication, which, if they had been known at the former trial, might have changed the result.” (*People v. Prather*, 343 Ill. 443 [1931].)

See also *Kansas City v. Southern Surety Co.*, 51 S.W.2d 221 (Mo. App., 1932); *Roney v. Westlake*, 216 Pa. 374 (1907); 2 Freeman on Judgments (5th Ed.), § 624 et seq.

I. APPELLANT BRIDGES HAS BEEN SUBJECTED TO DOUBLE JEOPARDY.

The Court below rejected appellant Bridges' claim of double jeopardy upon the ground that jeopardy attaches only to crimes and that deportation is not punishment for crime. Well-reasoned authority suggests a contrary view.

The constitutional protection against double jeopardy is not limited in terms to criminal offenses.

“Nor shall any person be subjected for the same offense to be twice put in jeopardy of life and limb.” (United States Constitution, Fifth Amendment.)

The incidence of jeopardy depends not upon the form of the proceeding but upon its substance. The test is whether a penalty or punishment may be imposed for a public rather than a private offense.

“The term ‘penalty’ involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution.” (*United States v. Chouteau*, 102 U.S. 246 [1881].)

“The test of whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual * * *” (*Huntington v. Attrill*, 146 U.S. 657 [1892].)

Civil proceedings to impose punishment for a non-criminal offense have been held to be governed by the principle against double jeopardy. (*United States v. Gates*, 25 F.Cas. No. 15,191 [S.D. N.Y., 1845]; *United States v. McKee*, 26 F.Cas. No. 15,688 [E.D. Mo., 1877]; *United States v. Lafranca*, 282 U.S. 568 [1931].)

That proceedings under the deportation laws are highly penal is not open to question.

“The statute in its effect upon the individual must be classed as penal * * * We regard forfei-

ture for misconduct of the privilege of an existing residence in the United States as a penalty.” (*Wallis v. Tecchio*, 65 F.2d 250 [5 Cir., 1933].)

“Thus deportation becomes as to aliens who have established a domicile here a decree of perpetual banishment and exile—regardless of fixed family and business ties and connections; and it more clearly carries a heavy burden of ‘possible human woe’.” (*Browne v. Zurbrick*, 45 F.2d 931 [6 Cir., 1930].)

As Mr. Justice Brandeis said in *Ng Fung Ho v. White*, 259 U.S. 276 (1922):

“[deportation] * * * may result also in the loss of both property and life or of all that makes life worth living.”

Not only have the Courts recognized the penal character of a deportation order as the foregoing demonstrates, but in the very Supreme Court decision which preceded by only five days the first overt act of the alleged conspiracy here, both Mr. Justice Douglas, for the Court, and Mr. Justice Murphy, concurring, applied constitutional safeguards which are normally associated only with criminal proceedings.

In determining whether Bridges’ cooperation with the Marine Workers Industrial Union made him in turn “affiliated” with the Communist Party within the meaning of the deportation statute, the Court had to consider the meaning of the term “affiliation” as used in the statute. Mr. Justice Douglas said:

“In that connection, it must be remembered that, although deportation technically is not criminal

punishment * * *, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling * * *” (*Bridges v. Wixon, supra*, at 147.)

The Court concluded that the construction given to the term “affiliation” by the Attorney General was too broad and this, of course, was one of the grounds for its reversal of this Court’s judgment. The Supreme Court said that it was not for it to say whether the evidence would justify a finding of affiliation upon the narrower ground which, by analogy, the doctrines of criminal law required. And while it recognized that an act innocent on its face might be done for an evil purpose, it pointed out that:

“Where the fate of a human being is at stake, the presence of the evil purpose may not be left to conjecture.” (*Ibid.*, at 149.)

Similarly, the Court had before it a problem in connection with the admissibility of certain hearsay testimony. It recognized that in the ordinary administrative proceeding hearsay testimony was generally admissible. But because of the serious consequences which flowed from a deportation order, it insisted upon a more rigid requirement. Mr. Justice Douglas said:

“But they [the hearsay statements] certainly would not be admissible in any criminal case as substantive evidence * * * So to hold would allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is

founded. There has been some relaxation of the rule in alien exclusion cases. But we are dealing here with deportation of aliens whose roots may have become, as they are in the present case, deeply fixed in this land. It is true that the courts have been liberal in relaxing the ordinary rules of evidence in administrative hearings. Yet as was aptly stated in *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U.S. 88, 93, 33 S.Ct. 185, 187, 57 L.Ed. 431, 'But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended.'

"Here the liberty of an individual is at stake. Highly incriminating statements were used against him—statements which were unsworn and which under the governing regulations are inadmissible. We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." (*Ibid.*, at 153-154.)

Mr. Justice Murphy considered what, if any, constitutional rights aliens had under the first ten amendments to the Constitution and what, if any, effect the inherent sovereign power to deport has upon those rights. He concluded that lawfully resident aliens as

well as citizens were entitled to the protection of the First and Fifth Amendments. Therefore he tested the deportation statute against the constitutional requirements of those amendments and concluded that the statute was invalid since it ignored the doctrine of personal guilt and substituted for it the doctrine of guilt by association. This, of course, is a concept that is peculiarly applicable to criminal proceedings. Yet Mr. Justice Murphy found that

“It is no answer that a deportation proceeding is technically non-criminal in nature and that a deportable alien is not adjudged guilty of a ‘crime.’ Those are over-subtle niceties that shed their significance when we are concerned with safeguarding the ideals of the Bill of Rights. The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death. There is thus no justifiable reason for discarding the democratic and humane tenets of our legal system and descending to the practices of despotism in dealing with deportation.” (*Ibid.*, at 163-164.)

Furthermore, Mr. Justice Murphy also applied to the deportation statute another constitutional protection which had theretofore been applied only in criminal cases. That was the clear and present danger rule.

“The deportation statute is further invalid under the ‘clear and present danger’ test enunciated in *Schenk v. United States*, 249 U.S. 47 * * *” (*Ibid.*, at 164.)

Since there was no evidence of any clear and present danger to the nation from the conduct or activities of Bridges, Mr. Justice Murphy concluded that:

“Deportation, with all its grave consequences, should not be sanctioned on such weak and unconvincing proof of a real and imminent threat to our national security.” (*Ibid.*, at 165.)

Not only in deportation cases but even in denaturalization cases the Supreme Court has applied constitutional guarantees which normally surround only criminal actions. (*Klapprott v. United States*, 335 U.S. 601 [1949].) This it has done because it has recognized that these cases are of such a nature and character as to require the application of guarantees normally thrown around criminal proceedings.

If it is recognized, as it has been, that standards of criminal law are applicable to deportation cases with respect to such matters as (1) the consequences which flow from those proceedings, (2) the type of evidence which may be adduced at such proceedings, (3) the burden of proof which the Government must sustain in such proceedings, (4) the rejection of non-criminal law doctrines such as guilt by association in such proceedings, and (5) the application of criminal law doctrines such as the clear and present danger rule in such proceedings, then it logically follows that the constitutional guarantees against double jeopardy must apply equally to such proceedings as it does to criminal proceedings in their narrowest sense.

The Supreme Court has recently recognized that the double jeopardy prohibition was aimed at “op-

pressive practices" irrespective of the form in which they were cast. (*Wade v. Hunter*, 336 U.S. 684 [1949].) Clearly the practices in which the Government is engaged so far as appellant Bridges is concerned, as revealed by the evidence before this Court, are the most "oppressive" one could imagine.

In the last cited case, Mr. Justice Murphy, in considering the application of the double jeopardy clause of the Fifth Amendment to the situation then before the Court, said:

"The harassment to the defendant from being repeatedly tried is not less because the army is advancing. The guarantee of the Constitution against double jeopardy *is not to be eroded away by a tide of plausible-appearing exceptions*. The command of the Fifth Amendment *does not allow temporizing* with the basic rights it declares." (*Ibid.*, at 694.)

Our research has failed to reveal a single case in which the question here posed has been ruled upon. We submit this is because never in the history of the Republic has an individual ever been subjected to the kind of persecution which it has been appellant Bridges' unhappy lot to suffer.

Considering that the objective of the Fifth Amendment is to guarantee against "oppressive practices" or "the harassment * * * from being repeatedly tried", it is clear that a violation of this guarantee is a denial of due process whether or not it is technically an instance of double jeopardy.

All of the essential elements of fairness, justice and proceeding in the due course of law which we have come to recognize as the essential elements of due process (Cooley, *Constitutional Limitations*, 7th Ed., Ch. 10 and 11) cry out against the kind of thing which has taken place with respect to appellant Bridges. It is no answer to say that technically prior proceedings were not of a criminal nature. A guarantee as basic as that which is contained in the Fifth Amendment is not to be disposed of by such technical arguments.

As was said in *Murphy v. United States*, 285 F. 801 (7 Cir., 1923), cert. den. 261 U.S. 617 (1923):

“The Fifth Amendment to the Constitution protects all against double punishment for the same offense. Its enforcement and its application demand a test which is a practical, not a theoretical one. It is the evidence, and not the theory of the pleader to which we must look to determine this issue.” (285 F. at 817.)

The fact, therefore, that in prior proceedings the Government was theoretically moving under a deportation statute and that in this proceeding it is theoretically moving under a criminal statute should not and does not deprive appellant Bridges of the constitutional protection of the Fifth Amendment. The evidence and the issues involved in all of the proceedings, including the present one, are identical.

II. APPELLANT HAS BEEN DENIED DUE PROCESS BY REASON OF THE REPEATED PROCEEDINGS AGAINST HIM.

Even if the constitutional prohibition against double jeopardy were technically confined to crimes, due process would, as we have indicated, reject the notion that a man may twice be tried for violation of the same statute.

The Supreme Court has made it clear in the past several years that the due process clauses in both the Fifth and the Fourteenth Amendments have an independent vitality and are not merely collections of the specific guarantees contained in either of those amendments. In *Palko v. Connecticut*, 302 U.S. 319 (1937) and *Adamson v. California*, 332 U.S. 46 (1947), the Court had occasion to examine the meaning and significance of the due process clause in this regard, and in each of these decisions it pointed out that that clause requires procedure which is "the very essence of ordered liberty."¹⁰ Thus this clause which protects the "ultimate decency in a civilized society"¹¹ requires the Court to examine "the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."¹²

¹⁰*Palko v. Connecticut*, *supra*, at 325.

¹¹*Adamson v. California*, *supra*, at 61.

¹²*Adamson v. California*, *supra*, at 67-68.

Earlier Mr. Justice Cardozo had said that a state would violate the due process clause of the Fourteenth Amendment by an administration of criminal law which would offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". (*Snyder v. Massachusetts*, 291 U.S. 97, 105 [1934].)

Two of the judges of the Supreme Court, while dissenting in the *Adamson* case, recognized that:

“Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.”¹³

We submit that the facts of this case clearly bring it within these proscriptions. If canons of decency and justice do not require this Court to strike down this proceeding as a violation of due process irrespective of the technical considerations of double jeopardy, then the words quoted above lose all meaning. The Supreme Court has said:

“Our minds rebel against permitting the same sovereign to punish an accused twice for the same offense.” (*Louisiana v. Resweber*, 329 U.S. 459, 462 [1947].)

And speaking of those deep-rooted principles of justice adverted to by Mr. Justice Cardozo in the *Snyder* case, *supra*, Mr. Justice Frankfurter, concurring, said:

“A state may offend such a principle of justice by brutal subjection of an individual to successive retrials on a charge on which he has been acquitted. Such conduct by a state might be a denial of due process, but not because of the protec-

¹³*Adamson v. California*, *supra*, at 124.

tion against double jeopardy in a federal prosecution against which the Fifth Amendment safeguards limits a state.” (*Ibid.*, 329 U.S. at 469.)

Assuming that these fundamental principles of justice are a part of due process, then it is clear that this Court must reject what has been done to appellant Bridges here.

“If there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offense.” (*United States v. Chouteau*, 102 U. S. 246, 249 [1881].)

And this principle prohibits not merely a second punishment for the same offense, but likewise a second trial.¹⁴

But if technical obstacles to the application of double jeopardy or due process cannot be scaled, no such problem exists with respect to *res judicata*. For, as Mr. Justice Brandeis said for a unanimous Court:

“* * * The Fifth Amendment in protecting against double jeopardy was not intended to supplant the fundamental principle of *res judicata* in criminal cases * * *” (*Collins v. Loisel*, 262 U.S. 426, 430 [1923].)

¹⁴*Ex parte Lange*, 18 Wall. 163 (1874); *Short v. United States*, 91 F.2d 614 (4 Cir., 1937). These considerations have impelled even arbitrators under collective bargaining contracts to apply the doctrine of double jeopardy to cases involving discharges of employees for alleged misconduct. *In re International Harvester Company*, 16 L. A. 616 (McCoy, 1951).

III. APPELLANT BRIDGES WAS IMPROPERLY DEPRIVED OF THE ADVANTAGE OF THE DOCTRINE OF RES JUDICATA.

The effect of the prior administrative and judicial determinations in the earlier proceedings and their impact on the present case were raised by appellant Bridges at every stage of this proceeding where he could conceivably raise them.

He first moved to dismiss the proceeding on those grounds. (Tr. 11-15.) That motion was denied by the trial Court. (*United States v. Bridges*, 86 F.Supp. 922, 928 [N.D. Calif., 1949].) He then objected to the introduction of any evidence having to do with events which antedated the prior determinations and which therefore either were or could have been embraced within the scope of the prior proceedings. (Tr. 736, 816-817.) His objections were overruled. (*United States v. Bridges*, 87 F.Supp. 14 [N.D. Calif., 1949].) He sought to introduce into evidence the decision of the Supreme Court in *Bridges v. Wixon* and the finding of Dean Landis. (Tr. 525, 590-600.) The Government's objection to the introduction of that evidence was sustained. (Tr. 600.) He proposed a series of instructions which would have applied the doctrine of *res judicata* to this case and the trial Court refused to give such instructions. (Tr. 293-296.) And finally, the trial Court gave instructions in which it specifically advised the jury that no force or effect whatsoever was to be given to any of the prior proceedings. (Tr. 332, 7868.)

On all of the foregoing counts the trial Court committed grave error. It failed to apply the principles

of *res judicata* to the case at bar and in so doing, it seriously prejudiced appellant's position.

Perhaps the key case in any discussion of the doctrine of *res judicata* is *Southern Pacific Co. v. United States*, 168 U.S. 1 (1897), where the Court said:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground for recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is *for a different cause of action*, the right, question, or *facts once so determined* must, as between the same parties or their privies, be taken as *conclusively established*, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and liberty of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." (*Ibid.*, 168 U.S. at 48, 49.)

This principle is one which is applicable irrespective of the nature of the suit or the forum in which it is tried. The sense of this principle is simple: that parties are bound by the results of the litigation in

which they engage and that they may not relitigate the same questions of fact over and over again even though they may find a new forum or may cast their cause in a different form.

The principle enunciated in the *Southern Pacific* case, *supra*, was carried forward in *Frank v. Mangum*, 237 U.S. 309 (1915).

“It is a fundamental principle of jurisprudence arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. *Southern Pacific Railroad Co. v. United States*, 168 U.S. 1 * * * The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction.” (*Ibid.*, 237 U.S. at 333, 334.)

In *United States v. Oppenheimer*, 242 U.S. 85 (1916), an indictment had been quashed because it was held to have been barred by the operation of the statute of limitations. Thereafter and in a subsequent case (the Government not having appealed in the case under consideration) it was held that a longer statutory period was applicable. The Government, within the period so determined, instituted a new proceeding. It was held that the dismissal in the first proceeding was *res judicata* as far as the second proceeding was concerned.

The significance of the case is that the Government there specifically contended that the doctrine of *res*

judicata did not apply to criminal cases. This contention was flatly rejected by the Court.

“Upon the merits the proposition of the government is that the doctrine of *res judicata* does not exist for criminal cases except in the modified form of the Fifth Amendment, that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb; and the conclusion is drawn that a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offense charged. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightfully mentioned with solemn reverence, are less than those that protect from a liability in debt * * * We may adopt in its application to this case the statement of a judge of great experience in the criminal law: ‘Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, the adjudication, whether it take the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense * * * In this respect the criminal law is in unison with that which prevails in civil proceedings.’ Hawkins, J., in *Reg. v. Miles*, L.R. 24 Q.B. Div. 423, 431 * * * The safeguard provided by the constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in civil law is a fundamental

principle of justice (*Jeter v. Hewitt*, 22 How. 352 * * *) in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time." (*Ibid.*, 242 U.S. at 87-88.)

In view of the basis for the principle, it is not surprising that the cases hold a determination in a criminal proceeding is *res judicata* in a civil case (*Coffey v. United States*, 116 U.S. 436 [1886]), a determination in an admiralty proceeding is *res judicata* in a civil action (*Gelston v. Hoyte*, 3 Wheat. 246 [1817]), a determination in an injunction suit is *res judicata* in an action for damages (*United States v. Munsingwear, Inc.*, 340 U.S. 36 [1950]); or a determination of an alien's right to enter the country is *res judicata* in a deportation proceeding. (*Choy Yuen Chan v. United States*, 30 F.2d 516 [9 Cir., 1929].)¹⁵

The question is *what* has been determined, not what was the form of action in which the determination was made.

In *New Orleans v. Citizens Bank*, 167 U.S. 371 (1897), the Court said:

"The proposition that because a suit for a tax of one year is a different demand from a suit for a tax of another, therefore *res judicata* cannot

¹⁵Where this Court held that a decision of the Board of Special Inquiry determining the right of an alien to enter this country was *res judicata* in a subsequent deportation proceeding, saying: " * * * it was not the intention of the law that one who has once been admitted upon proof which satisfied the board of his right to admission should be called upon again and again to prove his right to be and remain in the United States * * * " (*Ibid.*, 30 F.2d at 517.)

apply, whilst admitting in form the principle of the things adjudged, in reality substantially denies and destroys it. The estoppel resulting *from the thing adjudged* does not depend upon whether there is the same demand in both cases, but exists, even though there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule stated in the textbooks and enforced by many decisions of this court.” (*Ibid.*, 167 U.S. at 396.)

And, as said in *Coffey v. United States*, 116 U.S. 436 (1886),

“* * * where an issue raised as to the existence of the *act* or *fact* denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit in rem by the United States, where, as against him, *the existence of the same act or fact* is the matter in issue, as a cause for the forfeiture of the property prosecuted in such a suit in rem.” (*Ibid.*, 116 U.S. at 443.)

It was urged in the *Coffey* case that the doctrine of *res judicata* ought not apply since the Government in a criminal case had the burden of proving guilt beyond a reasonable doubt, and that evidence which failed to satisfy that burden might very well satisfy the lesser civil law doctrine of a preponderance of proof. The Court rejected the argument, saying that

since the facts had been put in issue between the parties and had been determined adversely to the United States, the Government could not go behind that determination and relitigate a question of fact in a subsequent proceeding even though it was a proceeding of a different nature.

“This doctrine is peculiarly applicable to a case like the present, where, in both proceedings, *criminal and civil, the United States is the party on the one side and this claimant the party on the other*. The judgment of acquittal in the criminal proceeding ascertained that the *facts* which were the basis of that proceeding and are the basis of this one, and *which are made by the statute the foundation of any punishment*, personal or pecuniary, *did not exist. This was ascertained once for all*, between the United States and the claimant, in the criminal proceeding, so that the facts cannot again be litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts.” (*Ibid.*, 116 U.S. at 444.)

This doctrine was recently repeated by the Supreme Court in *Sealfon v. United States*, 332 U.S. 575, 578 (1948):

“* * * res judicata may be a defense in a second prosecution. The doctrine applies to criminal as well as civil proceedings * * * and operates to conclude those matters in issue which the verdict determined though the offenses be different.”¹⁶

¹⁶This case was cited with approval by the Supreme Court in *United States v. Williams*, U.S., 71 S.Ct. 595, 598, 95 L. ed. 502, 504 (1951). See also *United States v. De Angelo*, 138 F.2d 466 (3 Cir., 1943).

These principles have been applied to naturalization cases as well as to other types of cases.

It has repeatedly been held that a naturalization certificate issued by a Court of competent jurisdiction and valid on its face is conclusive whenever collaterally attacked as to all matters necessarily involved in the issue presented.¹⁷

In the much cited and quoted case of *Spratt v. Spratt*, 4 Pet. 393 (1830), Chief Justice Marshall said:

“The various acts upon the subject submit the decision of the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry, and, like every other judgment, to be complete evidence of its own validity.

“The inconvenience which might arise from this principle has been pressed upon the court; but the inconvenience might be still greater if the opposite opinion be established.” (*Ibid.*, 4 Pet. at 407-408.)

This Court so held in *United States v. Pandit*, 15 F.2d 285 (9 Cir., 1926), cert. den. 273 U.S. 759 (1927) where the Government brought an action to cancel a certificate of naturalization on the ground that the

¹⁷See the overwhelming citation of authorities in 6 A.L.R. 407.

defendant was a Hindu and consequently not a "free white person" within the meaning of the Naturalization Act, and consequently was not entitled to naturalization. The Court held squarely that the decree admitting him to citizenship was *res judicata* on the disputed question of *fact*. It pointed out that the Government had appeared in the naturalization proceeding, had objected to the naturalization of the defendant on the ground that he was not a "free white person", that that question of fact had been submitted to the naturalization Court and had been fully litigated, argued and briefed, and that the determination was now conclusive.

"The issue in the trial court was clearly an issue of fact. The defendant asserted a status, 'free white person,' within the meaning of the Naturalization Act. This status the court determined as a question of fact, in considering the evidence presented and after the issue was fully briefed and argued. The court erred in its conclusions. " "Erroneous" means deviating from the law. * * *

Courts often speak of erroneous rulings, and always mean such as deviate from or are contrary to the law, but the term "erroneous" is never used by courts of law writers as designating a corrupt or evil act.' *Thompson v. Doty*, 72 Ind. 336 at 338. It means having power to act, but error in its exercise. *Matter of N.Y. Catholic Protectory*, 8 Hun. (N.Y.) 91, 196. See, also, *Chemung Nat. Bank v. Elmira*, 53 N.Y. 609; *Tiedt v. Carstensen*, 61 Iowa 365, 16 N.W. 214.

"The question of *res judicata* was raised in *Johannessen v. United States*, 225 U.S. 227, 238, 32 S.Ct. 613, 615 (56 L.Ed. 1066). The court said:

‘The foundation of the doctrine of *res judicata*, or estoppel by judgment, is that both parties have had their day in court, 2 Black, Judgts., secs. 500, 504. The general principle was clearly expressed by Mr. Justice Harlan, speaking for this court in *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48 [18 S.Ct. 18, 27, 42 L.Ed. 355], “that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.”’ And then it was said: ‘Sound reason, as we think, constrains us to deny to a certificate of naturalization, procured *ex parte* in the ordinary way, any conclusive effect as against the public.’

“The court in this decision recognized the doctrine of *res judicata*, except in *ex parte* cases, applicable to a naturalization hearing. In *Tutum v. United States*, *Neuberger v. United States*, 270 U.S. 568, at page 577, 46 S.Ct. at page 427 (70 L.Ed. 459) Justice Brandeis said: ‘In passing upon the application the court exercises judicial judgment.’ In *Mut. Benefit Life Ins. Co. v. Tisdale*, 91 U.S. 238, 245 (23 L.Ed. 314) the court said: ‘This certificate is, against all the world, a judgment of citizenship, from which may follow the right to vote and hold property.’

* * * * * *

“By the same token erroneously granting naturalization to the defendant, the right to citizenship having been distinctly put in issue, the United States appearing and contesting, and the issue directly determined by a court of competent jurisdiction, the judgment, not having been modified

or reversed, cannot now be disputed.” (*Ibid.*, 15 F.2d at 286-287.)¹⁶

Determinations by administrative tribunals possessing the power to subpoena witnesses and in which full litigation is had, have long been accorded the effect of *res judicata*. Of the many examples that may be cited, a few are here given: Determinations in favor of a claim of citizenship, made by a United States Commissioner in deportation proceedings (*United States v. Lew Ah Jung*, 224 F. 649 [D. Mass., 1915] *Leung Jun v. United States*, 171 F. 413 [2 Cir., 1909]); determinations in proceedings before the United States Patent Office (*In re Becker*, 74 F.2d 306 [C.C. P.A., 1935]; *Lavin v. Pierotti*, 129 F.2d 883 [C.C. P.A., 1942]); determinations in proceedings before the Board of Tax Appeals (*U.S. ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540 [1937]; *Haller v. Commissioner*, 26 B.T.A. 395, 400-401) determinations in reparations proceedings before the Interstate Commerce Commission (*Arizona Grocery Co. v. A. T. & S. F. Ry.*, 284 U.S. 370 [1932]; *Arizona Wholesale Grocery v. S. P. Co.*, 68 F.2d 601 [9 Cir., 1934]); determinations in proceedings to establish priority rights in state waters (*Farm Investment Co. v. Carpenter*, 9 Wyo. 110 [1900]); determinations in proceedings under the Longshore and Harbor Workers Act (*Roths-*

¹⁶It has even been held that a collateral attack upon a certificate of naturalization may not be maintained even in a criminal proceeding. *United States v. Hamilton*, 157 F. 569 (C.C. N.Y., 1907):

“The order of the court, the accompanying affidavits, and the certificate of citizenship were regular in form, and, until vacated and set aside, cannot be attacked collaterally, even on a criminal charge.”

child v. Marshall, 44 F.2d 546 [9 Cir., 1930]); determinations in proceedings under a State Workmen's Compensation Act (*Trigg v. Industrial Commission*, 364 Ill. 581 [1936]); determinations by a civil service commission (*Heap v. City of Los Angeles*, 6 Cal.2d 405 [1936]); determination by an agricultural pro-rate commission (*Olive etc. Committee v. Agricultural etc. Commission*, 17 Cal.2d 204 [1941]).

The true test is the character of the proceeding.

The determinations in the deportation cases were not legislative acts of general application operating in the future. They were decisions made final by statute (*United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 [1923]), rendered in specific cases and based upon findings supported by evidence of past events introduced at full hearings at which each party had his day in Court—contested hearings at which witnesses were compelled by subpoena to attend and in which they were sworn, examined and cross-examined. These are the characteristic elements which, when present in administrative proceedings, make the adjudication as solemn as the judgment of the Court, and hence subject to the usual rules of estoppel (*Butterworth v. United States*, 112 U.S. 50 [1884]; *Cardinal Bus Lines v. Consolidated Coach Corp.*, 254 Ky. 586 [1934]; *United States v. Pandit*, *supra*.)

If the adjudication in the first deportation hearing had not served to create an estoppel, there would have been no occasion to contend that the private bill passed in 1940 by the House of Representatives to secure Bridges' deportation was a breach of faith.

Yet this is precisely the point made by Mr. Justice, then Attorney-General, Jackson:

“This same alien has been accused, investigated, and tried at great length and judgment has been rendered that he has not been proved guilty of the charges made against him. By this bill the United States would deny faith and credit to its own duly conducted legal proceedings.” (Department of Justice Release, June 18, 1940.)

It is surely no less a denial of faith and credit to both adjudications that their disregard is now being sought by a judicial rather than a legislative act. Having been fully litigated (twice now), the case was entitled to remain closed.

The issue of fact litigated in the deportation proceedings was whether or not appellant was or had been, since his entry into the United States, a member of the Communist Party. In those proceedings this issue of fact was determined in favor of Bridges and adversely to the Government. As the authorities cited above indicate, the fact that the form of the proceedings has now changed does not make the determination of fact any the less binding upon the parties. In any proceeding between the parties and their privies the factual determination that Bridges is not and has not been since his entry into the United States a member of the Communist Party, is conclusive. It has been determined by tribunals of competent jurisdiction and cannot now be inquired into.

To hold that determinations made in deportation proceedings are not *res judicata* is to hold that the

Government, should it be so determined, may constantly retry the question of deportation in new proceedings, or retry the issues litigated in the deportation proceedings in a different forum. This means that the Government cannot possibly be defeated since it need not abide by any decision against it, and that only the incarceration, denaturalization and deportation of appellant Bridges or his ultimate bankruptcy, are final.

The trial Court committed clear error in failing to apply the principles of *res judicata* and for that reason its judgment must be reversed.

POINT III.

THE FIRST AND SECOND COUNTS OF THE INDICTMENT FAIL TO STATE FACTS SUFFICIENT TO CONSTITUTE AN OFFENSE AGAINST THE UNITED STATES.

(Specification of Errors 4, 5, 6, 19, 20.)

The first count of the indictment alleges that appellants conspired to have appellant Bridges falsely and fraudulently represent to the Superior Court that Bridges had never belonged to the Communist Party whereas in truth and in fact he had, and that "said statement and representation were material to said naturalization proceeding."

The second count of the indictment quotes the question put to, and the answer given by, appellant Bridges in this regard, and alleges that by so answering appellant Bridges "did then and there willfully and knowingly make a false statement under oath in

certain matters which were material to the issues in said proceedings.”

Materiality, therefore, is an essential ingredient of the offenses charged in both the first and second counts of the indictment.

An analysis of the law which obtained in the summer and fall of 1945 at the time the acts alleged in the first and second counts of the indictment were committed, demonstrates that the statement and representation alleged to have been made in the naturalization proceeding was not a material matter in that proceeding.

The fact that the indictment alleges that this statement and representation was “material” is of no consequence since such an allegation is only the conclusion of the pleader. The question of materiality is a question of law for the Court to determine and it is not precluded from making that determination by the language used in the indictment.

“If the matter or facts stated in the indictment as sworn to appear to the court not to be material, notwithstanding they are alleged so to be in the indictment, they will not be sufficient to support it.” (*United States v. Rhodes*, 212 F. 518, 519 [D.C. Ala., 1913].)

In a leading case in this circuit, *Luse v. United States*, 49 F.2d 241 (9 Cir., 1931), it is said:

“It is unquestionably true that the materiality of the evidence adduced upon the former trial was a question to be determined by the trial judge.

This was a question of law, but in a charge of perjury the question of materiality of the evidence adduced upon the former trial is necessarily a mixed question of law and fact. That is, it is not an abstract question of law, but depends upon what occurred at the former trial. Materiality depends primarily upon the issues involved in the former trial and upon the evidence adduced in support of these issues. What the evidence was, and what the pleadings were upon that trial, is a question of fact. Whether the testimony alleged to be perjured was material to such issues is a question of law.” (*Ibid.*, 49 F.2d at 245.)

Since the Court must determine as a matter of law whether the alleged false statement was material, it is necessary to consider briefly what is meant by a material matter.

“It is a general rule, supported by an even current of all the authorities, that to constitute perjury the statement alleged to be false must relate to a matter material to the issue, and that the same rule applies where the alleged false statement was produced before the grand jury. A statement upon which perjury may be assigned must have the following legal characteristics: (1) it must be competent testimony; (2) it must be material and relevant *to the issue*; (3) it must be a declaration of fact and not a conclusion of the witness; (4) it must be such that it would *properly influence* the tribunal before which it is made, in its determination of the issue under investigation; (5) it must be false; (6) its falsity must be known to the witness when made, and must be willfully and deliberately deposed

to.” (I *Wharton’s Criminal Evidence* [10th ed. 271-272].)¹

On the same subject it has been said in this circuit: “* * * ‘Materiality’ is a word to be measured by the surrounding circumstances. The materiality of the testimony should be determined *as of the time the testimony was given and by the matters then under investigation.*” (*Newman v. United States*, 58 F. (2d) 751, 754 [9 Cir., 1932].)

In *United States v. Cameron*, 282 F. 684 (D.C. Ariz., 1922), the Court said:

“It is to be observed that under the definition it is not sufficient to constitute the offense that the oath shall be merely false, but that it must be false in some ‘material matter’. Applying that definition to the facts stated in either count of this indictment, and it would seem that there is an entire lack in any essential sense to disclose that the particulars as to which the oath is alleged to have been false were material in the essential sense required for the purposes of an indictment for this offense.” (*Ibid.*, 282 F. at 692.)

What was being considered by the Superior Court on September 17, 1945, was a naturalization proceeding. In order to determine whether the alleged false statements and representations went to a matter then and there material to such a proceeding, it is necessary to consider the naturalization law as it then ex-

¹See also *ibid.* (11th ed.), 588-589.

isted. Only in that way is it possible to determine whether or not the questions put to appellant Bridges and upon which this entire prosecution is based, had any materiality.

The Nationality Code as it existed on September 17, 1945, provided that no person could be naturalized who advised, advocated or taught "opposition to all organized government", or "the overthrow by force or violence of the Government of the United States", or who wrote or published or caused to be written or published, literature to the same effect. (8 U.S.C.A. 705, 8 U.S.C. 732[a] [16].) It is not alleged in either Court One or Court Two of the indictment that the Nationality Code as it existed on September 17, 1945, precluded naturalization because of membership in the Communist Party. Therefore, the indictment lacks factual allegations to establish that the question was material.

As a matter of fact, only two years before these Superior Court proceedings, the Supreme Court of the United States had indicated that Communist Party membership was immaterial in a naturalization proceeding:

"The Nationality Act of 1940 * * * does not in terms make Communist beliefs or affiliations ground for refusal of naturalization." (*Schneiderman v. United States*, 320 U.S. 118, 132, note 8 [1943].)

Furthermore, it is significant that a question was put to appellant Bridges and answered by him which was material on September 17, 1945:

“Q. Do you now or have you ever belonged to any organization that advocated the overthrow of the government by force and violence?

A. No.” (Tr. 138.)

Thus it appears that the Government had asked and had received an answer to the ultimate question which was material under the statutes and under the cases. Any other questions that it asked, therefore, were not and could not have been material.

It is also significant that the indictment did not charge that the answer given to the question just quoted (which immediately preceded the question set forth in Count Two of the indictment), was false. In other words, the government in effect concedes that appellant Bridges did not, at the time of his naturalization, belong to any organization which advocated the overthrow of the government by force and violence. In effect, therefore, the government concedes that appellant Bridges was properly naturalized since, as we have indicated, the statute did not proscribe naturalization for membership in the Communist Party but only for membership in an organization advocating the overthrow of the government by force and violence.²

²The decision in *Dennis v. United States*, U.S., 71 S. Ct. 857, L. ed. (1951), is plainly immaterial. Aside from the fact that that prosecution originated under the Smith Act (18 U.S.C. [1946 ed.] 11) and is therefore a precedent of dubious value in this case, is the fact that the materiality of the question quoted in the second count of the indictment and referred to in the first, must be determined, as the foregoing authorities show, by a consideration of the statutes and the case law as it existed at the time the question was asked and answered, and a subsequent decision of the Court could not be deemed to impart materiality to a question which was immaterial at the time it was asked and answered.

POINT IV.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANTS OR ANY OF THEM FOR THE OFFENSE CHARGED IN THE FIRST COUNT OF THE INDICTMENT.

(Specification of Error 20.)

Although the first count of the indictment charges the crime of conspiracy, there was no direct evidence that appellants entered into a conspiracy.

The trial Court in fact so charged the jury:

“I instruct you that there has been no direct evidence presented in this courtroom that the defendants or any of them met together or agreed or conspired with each other or with any other persons to defraud the United States Government in any manner as alleged in the first count of the indictment.” (Tr. 7900.)

Nor was there any circumstantial evidence from which the jury could reasonably infer that appellants or any of them had agreed or conspired with each other or with any other person to defraud the United States Government in any manner as alleged in the first count of the indictment.

The first count of the indictment charges that appellants:

[a] “* * * did conspire with each other and with divers other persons to the grand jury unknown to defraud the United States by impairing, obstructing, and defeating the proper administration of its naturalization laws in the manner following to-wit:”

[b] “* * * by having said defendant, Harry Renton Bridges, fraudulently petition for and

obtain naturalization in a naturalization proceeding in the Superior Court of the State of California in and for the City and County of San Francisco,”

[c] “* * * by falsely and fraudulently stating and representing to the said court in said proceeding numbered 28152 in the records of said Superior Court that he, said defendant Harry Renton Bridges, had never belonged to the Communist Party in the United States.”

This is an interesting and unusual form of pleading in that the basic allegation is the third [c] to be stated and in that the allegations which precede it are no more than conclusions concerning the legal effect of the basic allegation.¹

The basic allegation [c] is that appellants conspired to have Bridges state and represent to the Superior Court that he had never belonged to the Communist Party in the United States. Upon this allegation is superimposed the allegation [b] that “by” so conspiring appellants conspired to have Bridges “fraudulently petition for and obtain naturalization”; and upon this allegation in turn is superimposed the allegation [a] that “by” so conspiring appellants conspired “to defraud the United States by impairing, obstructing and defeating the proper administration of its naturalization laws”. In other words, it is not

¹The Government undoubtedly cast the indictment in this form in an effort—an unsuccessful effort, it has been shown (see *supra*)—to avoid the limitations problem which would have been directly and obviously presented by a simple perjury or conspiracy to commit perjury indictment. See Norberg, *The Wartime Suspension of Limitations Act*, 3 Stanford Law Rev. 440, 445-446, where such pleading is referred to as a “procedural gimmick”.

charged that appellants conspired to defraud the United States or conspired to have Bridges fraudulently petition for and obtain naturalization *in any way other* than by having Bridges state and represent to the Superior Court that he had never belonged to the Communist Party.

Thus the heart of the conspiracy alleged in the first count of the indictment is an agreement by appellants to have *Bridges* make false representations to *the Superior Court* hearing his naturalization petition.

The first count specifies the time for the formation and duration of this conspiracy as follows:

“* * * on or about the 23rd day of June, 1945 and continuing thereafter until on or about October 1, 1945, and for some time prior thereto the exact time being to the grand jury unknown * * *”
(Tr. 4.)

The date of June 23, 1945, is repeated in the first overt act alleged as the date upon which Bridges filed with the Immigration and Naturalization Service his “Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization”.
(Tr. 5.)

The application so filed by Bridges was received in evidence as United States Exhibit 1. (Tr. 449-469.)² An examination of that document reveals that nowhere therein did Bridges state or represent that he had never belonged to the Communist Party in the

²This document is printed in the Transcript of Record in full as an exhibit to Bridges' affidavit in support of his motion to dismiss. (Tr. 102-125.)

United States and that nowhere therein did any interrogatory call for the making of such a statement or representation. As a matter of fact, the evidence shows that far from misrepresenting any facts on this application, Bridges answered one of the questions in detail as follows:

The 30th numbered interrogatory reads:

“Have you ever been arrested or charged with violation of any law of the United States or state or any city ordinance or traffic regulation? * * * If so, give full particulars.” (Tr. 108.)

The answer to this interrogatory was “Yes” and “See attached page paragraph (6).” (Tr. 108.) On the attached page in “paragraph (6)” the following statement was made:

“In 1938 I was arrested in Baltimore, Maryland, on a charge of being subject to deportation. My case was tried in 1939 at Angel Island before Dean James M. Landis. He found and held that the charges against me were untrue and recommended that the warrant of arrest be cancelled. The Secretary of Labor accepted this recommendation, and ordered the proceedings dismissed and the warrant of arrest cancelled. In 1941 I was again arrested in San Francisco under a warrant charging me with being subject to deportation. I was tried before Judge Charles Sears whose adverse recommendations were rejected by the United States Board of Immigration Appeals. This Board found that the charges against me were untrue and that they should be dismissed. However, Attorney General Biddle overruled the Board’s decision. I brought habeas

corpus proceedings in the federal court and these proceedings have just been terminated with a decision of the United States Supreme Court on June 18, 1945, reversing the lower court because it had refused to hold my deportation invalid and granting a writ of habeas corpus.” (Tr. 121-122.)

Bridges’ application itself (U.S. Ex. 1) thus shows that up until five days prior to its filing by him on June 23, 1945, there was outstanding against him a warrant of deportation based upon his alleged membership in or affiliation with the Communist Party. Since this warrant of deportation was both a practical and a legal bar to Bridges’ naturalization,³ it follows that no conspiracy to defraud the government by petitioning for and obtaining naturalization as charged in the first count of the indictment could have been entered into while that warrant was pending. As said by Chief Judge Learned Hand:

“* * * men do not conspire to do that which they entertain only as a possibility; they must unite in a purpose to bring to pass all the elements which constitute a crime.” (*United States v. Penn.*, 131 F. (2d) 1021 [2 Cir., 1942].)

In this case appellants could not have united in a purpose to bring to pass the naturalization of Bridges by fraudulent means—or any other means—so long as the warrant of deportation was pending against Bridges. In other words, there could not have been a conspiracy prior to June 18, 1945, for until that day,

³Cf. 8 U.S.C.A. 137, 705.

while the warrant was still pending, the naturalization of Bridges was both practically and legally impossible.

The only witness, other than appellants, who testified concerning any act or statement of any of the three appellants subsequent to June 18, 1945, was Lloyd H. Garner, a naturalization examiner.

Many other witnesses gave testimony in an attempt by the government to prove that appellants were members of the Communist Party for some years prior to 1945. Such evidence, however, had no tendency to prove that appellants conspired in the spring and summer of 1945 as charged in the first count of the indictment.

Garner's testimony of the events subsequent to June 18, 1945, was that he saw appellants on only three occasions (Tr. 447): (1) on June 23, 1945, when Bridges filed his application (Tr. 447-450); (2) on August 8, 1945, when Bridges and his witnesses appeared in the office of the County Clerk (Tr. 451); and (3) on September 17, 1945, when Bridges' petition for naturalization came on for hearing in the Superior Court. (Tr. 465-466.) Garner saw appellants Schmidt and Robertson on the latter two occasions only. (Tr. 447-449.)

Garner did not testify to having had any conversation with Bridges on the first of these occasions, June 23, 1945; but only to having received from him the application. (Tr. 450.) As we have already pointed out, there is no statement or representation in that application by Bridges, and no interrogatory is

contained therein which calls for any statement or representation, concerning membership in the Communist Party. Thus there is no evidence either direct or circumstantial that a conspiracy as charged was entered into or was being carried out on June 23, 1945.

Concerning his interview with Bridges on August 8, 1945, Garner testified on direct examination as follows:

“Q. * * * Would you tell us exactly what you did, what you characterize as conducting a preliminary examination?

A. With the application before me, I called Mr. Bridges, the applicant, into my presence in the examination room, swore him to tell the truth in connection with the proceeding, and undertook then to verify the information as it is set down in the application.

Q. And how do you go about doing that?

A. I did that by reading the questions that appear on the application and asking for his responses. *And the responses as he gave them were checked against the questions asked on the application form.*

Q. *And those, what appear to be penciled check marks against each question, were they put there by you and at that time?*

A. *They were put there by me at the time I asked the questions, yes, sir.*

Q. Is there anything on that application, Mr. Garner, which would indicate by whom that application was prepared?

A. On page 2 of the application, question No. 35, ‘Did you yourself fill out this form?’ The typewritten answer is ‘Yes’, and the document is signed ‘Harry Renton Bridges’.

Q. Now, after having checked Mr. Bridges' answers as you have indicated, what did you further do?

A. After I had completed the examination of Mr. Bridges, then I called for his two witnesses. I asked him to leave the examination room and the witnesses or persons whom he offered as witnesses in his behalf came into my presence in the room." (Tr. 451-452.)

Thus it appears that Garner did not, on August 8, 1945, ask Bridges about membership in the Communist Party and that Bridges did not on that occasion make any statement or representation on the subject.

Garner further testified that after he completed the examination of Bridges and his witnesses (we will discuss the examination of the witnesses below), he handed the petition for naturalization in triplicate form, together with the original application, to the Deputy Clerk of the Court to have the petition typed for signing and that he, Garner, then departed. (Tr. 465.)

This petition for naturalization as filled in, signed and filed later in the day of August 8, 1945, was received in evidence as United States Exhibit 2. (Tr. 469.)⁴ An examination of the petition discloses that nowhere therein did Bridges make any statement or representation about membership in the Communist Party and that nowhere therein did any interrogatory

⁴This document is printed in the Transcript of Record in full as an exhibit to Bridges' affidavit in support of his motion to dismiss. (Tr. 125-133.)

call for the making of any statement or representation on that subject. Thus, as far as Bridges is concerned there is no evidence that a conspiracy as charged was entered into or was being carried out on August 8, 1945.

While Garner testified concerning what was said and done at the Court hearing on September 17, 1945, the transcript of that proceeding received in evidence as United States Exhibit 3 (Tr. 480) is more complete and more accurate.⁵ The transcript reveals that appellants Schmidt and Robertson were first examined by Garner; that after their examination Garner stated to the Court: "These witnesses are satisfactory, your Honor"; that both the clerk of the Court and the judge of the Court informed the witnesses that they might leave; and that thereafter Garner examined Bridges. (Tr. 134-135.) The transcript further reveals that at no time during the hearing did either his witnesses or Bridges volunteer any statement or representation that Bridges had never belonged to the Communist Party, but that such statement or representation as Bridges (alone) made on the subject was made in response to the question asked of him by Garner (who was then acting on behalf of the government and not as counsel for Bridges).

Concerning the hearing of September 17, 1945, Garner testified that he had not been directed to make any objection to Bridges' petition for naturalization (Tr. 479, 504), but on the contrary he had been in-

⁵The transcript of the Superior Court proceeding is printed in full in the Transcript of Record as an exhibit to Bridges' affidavit in support of his motion to dismiss. (Tr. 134-145.)

structed by his immediate superior not to make any objection. (Tr. 532.) He further testified that at the hearing he asked Bridges all the questions which occurred to his mind to be proper at that time. (Tr. 503.)

The record indicates that a fortuitous circumstance which was brought to his attention on the morning of the Court hearing prompted Garner to ask Bridges two additional questions: one, about Communist Party membership, and another about whether Bridges had ever used a different name. This circumstance was that on Friday, September 14, 1945, there was received at the office of the Immigration and Naturalization Service in San Francisco an affidavit of Bridges' then-wife (from whom Bridges was at that time in the process of obtaining a divorce) wherein it was alleged that Bridges was a member of the Communist Party under the name of Dorgan. (Tr. 138-144, 514.) The following indicates that Garner's questions about membership in the Communist Party and the use of another name were prompted by this fortuitous circumstance:

"Mr. Garner. If the Court please, I have no further evidence. I have an affidavit which was received by the Department on Friday of last week. I have had no opportunity to make any investigation of it. I merely offer it for what it is worth (handing to Court).

The Court. This is an affidavit of Agnes Bridges. Is that Mrs. Bridges?

The Witness. My wife, yes, sir.

Mr. Garner. It contains certain statements there that——

The Court. Well, I think this—I don't think that this affidavit can be used as substantive evidence.

Mr. Garner. I am not offering it as evidence.

The Court. But, however, the information in it can be used as a basis for questioning the Petitioner, if you see fit to.

Mr. Garner. It sets out there that he has been known under another name. I have asked him and he has denied it." (Tr. 139.)

From the foregoing it affirmatively appears that at no time between June 18, 1945, and September 17, 1945,⁶ did Bridges volunteer the statement or representation that he had never belonged to the Communist Party in the United States and that the only statement or representation made by him on that subject between such dates was not made pursuant to or in furtherance of any conspiracy but was made solely because Garner asked a question which called for a statement or representation on the subject. It is unmistakably evident that had Garner not asked the question, the entire naturalization proceeding would have terminated with Bridges' naturalization without Bridges at any time having made any statement or representation on the subject. Thus, had the question not been asked, it would have positively appeared that either one of two things were so: the conspiracy charged had never been formed; or if formed, it had been voluntarily abandoned without any attempt having been made to carry it into execution. In either

⁶The indictment alleges the conspiracy continued until October 1, 1945. There is no evidence of any acts committed or statements made after September 17, 1945.

event, there would have been no criminal liability on the part of any of the appellants.⁷

The mere fact that Garner happened to ask the question and that Bridges answered it as he did does not even tend to show that a conspiracy as charged had been formed. Moreover, as Bridges at no time volunteered any statement or representation concerning membership in the Communist Party, it affirmatively appears that if a conspiracy as charged had ever been formed, it was voluntarily abandoned before Garner asked the question which brought forth the one and only statement or representation made by Bridges on the subject.

To put this another way: Either the appellants had conspired as charged in the first count of the indictment prior to the asking of that question by Garner, or they had not. The fact that Garner asked the question and that Bridges answered it as he did could neither bring into being a conspiracy which had not theretofore existed; nor could it revive a conspiracy

⁷This Court's decision in *United States v. Marino*, 91 F.2d 691 (9 Cir., 1937), recognizes that a conspiracy, in which an overt act in furtherance thereof is necessary to complete the offense, may be abandoned before the doing of such an overt act, and the parties are thereby relieved of criminal responsibility. Where the common purpose is to accomplish a lawful end by lawful means, there is no conspiracy. To obtain naturalization is a lawful end. If there was any conspiracy in this case, it was not to obtain the naturalization, *but to use unlawful means in obtaining it*. The overt act, therefore, would have to be in furtherance of the use of unlawful means. No such overt act was proved. *Buhler v. United States*, 33 F.2d 382 (9 Cir., 1929), and *Eldridge v. United States*, 62 F.2d 449 (10 Cir., 1932), recognize that the abandonment of a conspiracy may be established by circumstances wholly inconsistent with the continuation of the conspiracy.

which if it had theretofore existed, had been voluntarily abandoned. If no conspiracy existed, the fact that Garner asked and Bridges answered a question could not serve to create a conspiracy between Bridges, Robertson and Schmidt. If there had been a conspiracy but it had been abandoned before Garner asked his question, then the answering of the question—e.g., the unilateral act of one of the former members of the conspiracy—could not revive it; a new understanding or agreement would be necessary to revive such an abandoned conspiracy.

We have said above that it appears from the record either that the conspiracy charged had never been formed or that having been formed, it was voluntarily abandoned without any attempt having been made to carry it into execution. We do not mean to admit or suggest that there is in the record any evidence from which it can reasonably be inferred that such a conspiracy was ever formed. On the contrary, we contend not only that there is no such evidence, but that all of the circumstances as revealed by the evidence indicate in an affirmative way that such a conspiracy was never formed.

One such circumstance is the fact that for a period of eleven years, that is from 1934 to 1945, Bridges had been actively and vigorously defending himself against the charge that he was or had been a member of, or was or had been affiliated with, the Communist Party. From this circumstance it was naturally to be assumed that Bridges would continue to defend himself against such a charge whenever, wherever,

and however it came or happened to be raised or revived, and that he would do so without the urging of any other person. It was also naturally to be assumed from this circumstance that Bridges would not, either by himself or in collaboration with others, raise or revive that charge and thus put himself to the task and hazard of again refuting it. Thus it was naturally to be assumed that Bridges would not, either by himself or in collaboration with others, inject into the naturalization proceeding the issue concerning Communist Party membership, but on the contrary that he would hope and desire that such issue would not be injected into that proceeding by any other person.

These inferences are supported by what Bridges did and did not do in connection with the naturalization proceeding. First, at no time did he himself raise the issue. Second, in answering the thirtieth interrogatory of his application he mentioned his two arrests on warrants of deportation to avoid the charge that he was concealing those arrests, and he mentioned the outcome of the proceedings following those arrests; but he did these things without mentioning that in each instance the charges which he had been called upon to refute had to do with alleged membership in the Communist Party. Third, when without any prompting from Bridges, Garner in open Court asked him the direct question, Bridges continued to defend himself as for years he had been defending himself against the charge by making the same denials which he had

previously and consistently made, and did so without hesitation or consultation.

Another circumstance which indicates that a conspiracy as charged was never formed is this: The decision of the Supreme Court in *Bridges v. Wixon*, *supra*, and particularly the excoriation by Mr. Justice Murphy of the Immigration and Naturalization Service, made it quite unlikely that shortly thereafter that service would again raise the question of whether Bridges was or had been a member of the Communist Party. It may be assumed that Bridges, Schmidt and Robertson severally would and did believe that the question had finally been put to rest and that no attempt would be made, particularly by a representative of the Immigration and Naturalization Service, to raise that question in the naturalization proceedings.⁸

So far we have not considered the testimony of Garner insofar as it relates to Robertson and Schmidt. as there is no *direct* evidence of a conspiracy, and as the charge was that appellants conspired to have *Bridges* state and represent that he had not been

⁸In this respect appellant Schmidt testified:

“* * * I had read the decision of the Supreme Court and I thought, well, as long as the highest tribunal in the United States of America has made a decision with respect to this case, the matter is now settled for all time.” (Tr. 4225-4226.)

And appellant Robertson also testified:

“And finally, a decision of the U.S. Supreme Court came out. I studied that decision. I studied the majority decision and I studied the concurring decision, and I made up my mind then and there that President Bridges was not, had never been, and was never affiliated with the Communist Party; and the Supreme Court of the United States is something that I think speaks with authority.” (Tr. 4617.)

a member of the Communist Party, and as Bridges did not volunteer any such statement or representation, Garner's testimony concerning the statements made by appellants Schmidt and Robertson would seem to be irrelevant and immaterial insofar as the conspiracy as charged is concerned. However, because we anticipate that the Government will attempt to find some indication of the existence of the conspiracy as charged in Garner's testimony concerning the statements made by appellants Schmidt and Robertson, we proceed to examine that testimony.

First we note that the application filed by Bridges on June 23, 1945 (U.S. Ex. 1), named as Bridges' two witnesses *Paul Schnur* and Henry Schmidt. (Tr. 114.) Neither of these men nor appellant Robertson was examined or made any relevant statements on June 23, 1945.

Of the examination on August 8, 1945, Garner testified as follows:⁹

“After I had completed the examination of Mr. Bridges, then I called for his two witnesses. I asked him to leave the examination room and the witnesses or persons whom he offered as witnesses

⁹This testimony was all immaterial for the reason indicated above.

It will be noted that with respect to the events of August 8, 1945, the indictment (Tr. 5) alleges that *Bridges* “gave testimony” in the matter of the naturalization application and that Schmidt and Robertson “signed as witnesses” the naturalization petition. It is not charged that the giving of testimony by Schmidt and Robertson was an overt act in furtherance of the conspiracy.

in his behalf came into my presence in the room.”
(Tr. 452.)

Garner testified that he “was alone with each of the men respectively” (Tr. 489); that is, he and Bridges were alone when he questioned Bridges; he and Schmidt were alone when he questioned Schmidt; and he and Schnur were alone when he questioned Schnur. Garner further testified that he first examined Bridges, then Schmidt, then Schnur; that he rejected Schnur as a witness because he did not have with him satisfactory proof of his claim to derivative citizenship (Tr. 459-462); that he then “stepped to the door of the hearing room where Mr. Bridges and his attorney and other members of his party were waiting outside, called Mr. Gladstein, his attorney, and explained the situation to him that the case was going over to another day or if possible he could substitute a witness who was qualified” (Tr. 462); that “after a conversation outside of my presence he [Mr. Gladstein] returned with Mr. Robertson and said that he thought that Mr. Robertson could qualify, being a native-born citizen” (Tr. 463). That the conversation outside the presence of Garner was of short duration is indicated by the previous statement of this witness that “* * * after I started the examination of Mr. Schnur and disqualified him, I called for another witness and Mr. Robertson came in” (Tr. 461) “immediately” (Tr. 462).

These events which happened spontaneously on August 8, 1945, clearly negative the formation or existence of a conspiracy as charged in the indictment.

Both the petition for naturalization (U.S. Ex. 2) and the affidavit of witnesses annexed thereto (Tr. 130-131) follow a set form designed to elicit the information and declarations required by the naturalization statute. Before the petition itself or the affidavit of witnesses is typed the examiner separately swears and questions the applicant and his witnesses to ascertain whether each has the qualifications required by the statute. If the applicant and his witnesses are so qualified, the petition and the annexed affidavit are typed in triplicate. The typed petition is then signed under oath by the applicant and the annexed affidavit is signed under oath by the witnesses. These oaths are administered not by the examiner but by the clerk of the Court in which the petition is to be filed. This was the procedure followed in this case. (Tr. 464-465.)

Before considering Garner's testimony concerning his interviews with Schmidt and Robertson, it is well to remember that he had already testified that in his examination of Bridges on August 8, 1945, he merely followed the form and checked with Bridges to ascertain whether the answers to the questions on the form were correct. At no time did he go outside of any of the questions propounded on the form in his examination of Bridges, the chief figure in this proceeding. It must further be noted that the form of "Affidavit of Witnesses" used on August 8, 1945, by Garner when he questioned Schmidt and Robertson did not call for any declaration as to whether they were or had been members of the Communist Party

or as to whether Bridges was or had been a member of the Communist Party.¹⁰

Garner testified that in questioning Schmidt on August 8, 1945:

“I asked him under what circumstances he usually saw the applicant, whether in business or socially. He replied in business, that they were both officers or officials of the same union, the ILWU. I then asked him whether he was a Communist or a member of the Communist Party. He said he was not * * * I asked him whether the applicant was a member of the Communist Party and he answered negatively at that time.” (Tr. 457.)

Garner further testified that in questioning Robertson on the same occasion:

“* * * I asked him in what connection he usually saw the applicant, whether business or socially, and he said that they were both officers of the same organization, the union, ILWU. He saw him in connection with his work there. I asked him then whether he was a member of the Com-

¹⁰In this connection Garner testified that his purpose in asking questions of Schmidt and Robertson was to “fulfill the duties imposed upon me by law as a naturalization examiner to test the qualifications of the applicant and the witnesses in a naturalization proceeding”. (Tr. 464-465.) He did not at any time indicate that he had an intention or desire to go outside of, or beyond the scope of, such duties. It must also be noted that a bald question as to Communist Party membership would probably not have been asked in view of *Schneiderman v. United States*, 320 U.S. 118 (1943), which had held only two years before this interview of August 8, 1945, that membership in the Communist Party was not grounds for revoking (and, by clear inference, see 320 U.S. at 132, n. 8, denying) naturalization. Garner was required to, and did, keep himself abreast of Court decisions affecting his work as a naturalization examiner. (Tr. 464, 523ff, and cf. 559-560.)

munist Party and he said he was not. I asked him whether the applicant, Mr. Bridges, was a member of the Communist Party and he said he was not." (Tr. 463.)

At the time of his examination of both Schmidt and Robertson, Garner made certain notations. (Tr. 488.) One of these notations had to do with the fact that "both witnesses are members of the same union, the ILWU." (Tr. 489.) The other read "Your recommendation: Investigate loyalty and attachment to Constitution and police report." (Tr. 491.) There was no notation concerning any questions or answers with respect to the membership of anyone in the Communist Party. (Tr. 488-489.) Such notations as there were, were the only memorial of what was said at the time. (Tr. 488.) Garner testified that he did not recall having had any discussion about the Bridges matter after September 17, 1945, until three and one-half years after these events, "I think about the spring of 1949." (Tr. 540.)

Garner's testimony concerning statements purportedly made to him by Schmidt and Robertson respecting Communist Party membership of either themselves or Bridges is, if material, of no probative value. In connection with Bridges, Garner admits that he carefully followed the form. No reason is advanced why he should have departed from and gone beyond the form insofar as the two witnesses were concerned. No reason is advanced why, since he was making notations on other matters, he would not have made a notation on the matter of Communist

Party membership had it in fact been discussed. The absence of such a notation on the very document which Garner himself used is highly persuasive that there was no such discussion. Nor can Garner's testimony be accepted as an independent recollection of what transpired at a date approximately five years prior to the time of his testimony.

Appellant Schmidt testified that he had no recollection of any person connected with the Immigration and Naturalization Service asking him whether he or Bridges were members of the Communist Party. (Tr. 4220.)

Appellant Robertson in effect denied that on August 8, 1945, Garner had asked him whether he or Bridges were members of the Communist Party when, in testifying as to what occurred on that occasion, he said:

"Well, I was called in and, I guess I sat down. I don't recall all the details. And I was presented as one of those who was going to be a character witness for Mr. Bridges, and I was asked the routine questions: my name, my place of origin, am I a citizen of the United States, 'how long have you known Mr. Bridges?' and I told how long I had known him. I think I said ten years or so, I don't recall exactly what answer I gave and 'Is he a man of good moral character?' I said 'Yes, he is.'

" 'And is he a man that you would recommend for citizenship?' And I said 'I most certainly would.' *That's the gist of what happened there.*" (Tr. 4609.)

Disregarding the inherent weakness and lack of credibility of Garner's testimony about having on August 8, 1945, asked Schmidt and Robertson whether they and Bridges were members of the Communist Party, and assuming for the moment that such questions were asked and answered as testified to by Garner, we now consider whether such evidence constitutes proof that the conspiracy charged in the first count of the indictment ever existed.

It goes without saying that the facts testified to by Garner, all of which related to his examination of Schmidt and Robertson on August 8, 1945, could not prove and had no tendency to prove that a conspiracy as charged was formed at any time subsequent to August 8, 1945. This is so first, because there is no direct evidence that such a conspiracy was later formed; and second, because there is no evidence of any voluntary act by any of the appellants after that date which in connection with Garner's testimony as to the events of that date indicates even circumstantially that such a conspiracy was ever formed. It also goes without saying that inasmuch as Garner's examination of each of the appellants was held out of the presence of the others and in rapid succession, the facts testified to by Garner had no tendency to prove that a conspiracy as charged was formed during the time, on August 8, 1945, when Garner was examining Schmidt and Robertson.¹¹ This leaves only the question: Do the facts testified to by Garner have

¹¹In this regard, the significance of the last minute substitution of Robertson for Schnur (see *supra*) cannot be overlooked.

any tendency to prove that a conspiracy as charged was formed prior to, and was in existence at the time of, the examination of Schmidt and Robertson by Garner on August 8, 1945?

Had Schmidt and Robertson on August 8, 1945, volunteered statements to the effect that Bridges was not a member of the Communist Party there might be some basis for a *suspicion* that such voluntary statements were made pursuant to a previous agreement to make them. But, even according to Garner, neither Schmidt nor Robertson volunteered any statements to him. Such statements were made (if they were made) only because Garner asked questions which called for statements on the subject. This certainly has no tendency to prove that there was any pre-existing agreement that Schmidt and Robertson should make the statement that Bridges was not a member of the Communist Party or that they themselves were not members of the Communist Party.¹² Both Schmidt and Robertson categorically deny that any such agreement had ever been reached prior to August 8, 1945, or at any other time. (Tr. 4195-4197, 4608-4609.)

Indeed, the circumstances under which Robertson was substituted as a witness in the place of Schnur quite positively indicate that Robertson did not even contemplate becoming a witness in the matter until

¹²The testimony about Schmidt's and Robertson's alleged membership in the Communist Party is clearly immaterial in the light of the indictment which charges the "fraud" to consist of misrepresentations concerning *Bridges'* alleged membership in the Communist Party.

he was called to be a witness and after Garner had completed his examination of both Bridges and Schmidt.¹³ Moreover, there is a complete absence of evidence from which it could be inferred that either Schmidt or Robertson had any reason to anticipate that Garner would ask the witnesses whether Bridges was a Communist. As we have already pointed out, the decision in *Bridges v. Wixon, supra*, and particularly the concurring opinion of Mr. Justice Murphy, seemed to make it altogether unlikely that any member of the Immigration and Naturalization Service would again raise the question of whether Bridges was a member of the Communist Party and by so doing would continue or seem to continue the prosecution which Mr. Justice Murphy so vigorously condemned.

Thus every indication to be gleaned from the record is that if Garner in fact asked Schmidt and Robertson whether Bridges was a member of the Communist Party, their respective answers were their own indi-

¹³Robertson testified:

"Suddenly, and I do not know what was happening inside because I was not there—suddenly Dick Gladstein stuck his head out of the door and he looked over at the crowd and he saw me and he said, 'Come on, Robertson, you will be a witness for Bridges,' or words to that effect. And of course I was proud of standing up for Bridges and being a character witness for him. I had no idea that this was going to happen, because some time before I had talked to Harry * * * this was weeks before the August period * * * and Harry I can remember very emphatically—Harry said, 'No, I want two people from the labor movement to represent me. As far as I am concerned it could be Paul Schnur * * * and Henry Schmidt' * * * So I took it for granted it is going to be Henry and it is going to be Paul. They are going to be his character witnesses.'" (Tr. 4607-4608.)

vidual acts and were not pursuant to or in furtherance of any previous arrangement, agreement or understanding.

It is also significant that the charge in the first count of the indictment is that appellants conspired to have *Bridges* state and represent in a naturalization proceeding in the Superior Court "numbered 28152 in the records of said court that he, the said defendant Harry Renton Bridges, had never belonged to the Communist Party in the United States." Such statements and representations as were made by Schmidt and Robertson on August 8, 1945 (even assuming they were made as testified to by Garner) were not statements or representations made by Bridges.¹⁴ Nor were they statements and representations made in any Superior Court proceeding, much less a Superior Court proceeding "numbered 28152" in San Francisco County, since whatever statements and representations were made by Schmidt and Robertson were made before there was any such proceeding in existence. Such a proceeding was commenced by the filing of the petition with the clerk of the Court. That petition was not even typed, much less filed, until *after* Garner had completed his examination of Schmidt and Robertson.¹⁵ Moreover, such

¹⁴The indictment does not allege that appellants conspired to have Schmidt and Robertson make false representations; it alleges that they conspired to have Bridges make false representations. (Tr. 4.)

¹⁵See *supra*, and Garner's testimony concerning his examination of Schmidt and Robertson. "At that time there was no petition. He [Bridges] was merely an applicant to file a petition." (Tr. 457.)

statements and representations as were made on the subject of Communist Party membership by Schmidt and Robertson were made to Garner and not to the Court.¹⁶ And Garner never, in writing or otherwise, even suggested to the Court that Schmidt or Robertson or either of them had made any statements or representations of any kind to him. Such being the case, there is absolutely no basis for the contention that such representations of Schmidt and Robertson (if they made them) constitute either in whole or in part the statement and representation alleged in the first count of the indictment, or that they in any way rendered Bridges' naturalization either false or fraudulent.

The cases clearly demonstrate that the convictions here obtained on the first count of the indictment cannot be sustained. Evidence of a much stronger character than that here found has been held insufficient to support conspiracy convictions. This is particularly so in cases wherein, as here, the government has relied solely upon circumstantial evidence.

In *Kassin v. United States*, 87 F. 2d 183 (5 Cir., 1937), the Court said:

“Wide, sweeping and damaging as is a charge of conspiracy, difficult as it is for one caught in the net of such a charge to extricate himself from it when the government has any evidence tending

¹⁶The indictment alleges that the appellants conspired to have Bridges falsely state and represent certain matters “to the said court”. (Tr. 4.)

to connect him with it, such a charge, no less than charges of substantive offenses, requires proof. This proof may be circumstantial or direct, or both, but it must be proof, that is, the evidence must have a legitimate tendency to impel a belief in and a finding of defendant's guilt. It may not consist merely of circumstances having such remote relation to the facts to be proved as that they have not a probable, but only a possible relevancy * * * Where the evidence is purely circumstantial, the links in the chain must be clearly proven, and taken together must point not to the possibility or probability, but to the moral certainty of guilt. That is, the inferences which may reasonably be drawn from them as a whole must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence * * * This rule applies with the same force where conspiracy is the charge, as where substantive offenses are in question. Conspiracy does indeed widen the scope of relevant evidence through the operation of the principle of agency or representation by which all are made responsible for the acts of each of the partners in crime. This, however, is not a breakdown, it is merely an application of the rules of evidence. Conspiracy charges do not present opportunities for departure from, they present merely specific instances for the application of, the rules governing the problem of judicial proof * * * One of the prime rules in the trial of criminal cases is that circumstances, when relevant and cogent, may constitute evidence of guilt, but they must have a legal, as well as a logical, relevancy, and they must have probative force; that is, they must point with compelling force to the fact to be

proven. Circumstances which merely raise suspicion or give room for conjecture are not sufficient evidence of guilt * * * A conviction resting on them alone cannot stand.” (*Ibid.*, 87 F. (2d) at 184-185.)

There is absolutely no evidence, circumstantial or otherwise, which establishes the “moral certainty of guilt” of Schmidt, Robertson or Bridges of the crime *charged in the first count* of the indictment—the crime of conspiring together to have Bridges make a false representation to the Superior Court. There is no evidence which is “inconsistent with every reasonable hypothesis of innocence” of this crime.

In *Peightel v. United States*, 49 F. (2d) 235 (8 Cir., 1931), the Court said:

“When the circumstances relied upon are as consistent with innocence as with guilt, *they are robbed of all probative value* * * *” (*Ibid.*, 49 F. (2d) at 240.)

In *Ribaste v. United States*, 44 F. (2d) 21 (8 Cir., 1930), the Court said:

“It will thus be seen, and it is conceded by counsel for the government that the evidence against Ribaste was wholly circumstantial. The facts and circumstances proved and relied upon by the government to sustain Ribaste’s conviction must therefore not only be consistent with his guilt, but must be inconsistent with his innocence * * *

“Confessedly, there are some suspicious circumstances proven in this case * * * But mere suspicion is not sufficient to prove the guilt of a

defendant beyond a reasonable doubt.” (*Ibid.*, 44 F. (2d) at 23.)

In *Dahly v. United States*, 50 F. (2d) 37 (8 Cir., 1931), the Court said that while circumstantial evidence is equally available with direct evidence to prove a conspiracy,

“* * * suspicion or conjecture cannot take the place of evidence. Guilt must be established beyond a reasonable doubt, and, where the evidence is as consistent with innocence as with guilt, no conviction can properly be had. Even participation in the offense which is the object of the conspiracy does not necessarily prove the participant guilty of conspiracy. The evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must in addition thereto, be proof of unlawful agreement and participation therein, with knowledge of the agreement.” (*Ibid.*, 50 F. (2d) at 43.)

The rules enunciated in these and other circuits¹⁷ have been applied by this circuit. See *Laurent v. United States*, 149 F. (2d) 598 (9 Cir., 1945.)

In each of the cases cited the suspicious circumstances were substantially stronger than in the case at bar and yet the convictions were reversed.

¹⁷See also *Tingle v. United States*, 38 F.2d 573 (8 Cir., 1930); *Langer v. United States*, 76 F.2d 817 (8 Cir., 1935); *Gable v. United States*, 84 F.2d 929 (7 Cir., 1936); *Copeland v. United States*, 90 F.2d 78 (5 Cir., 1937); *Fulbright v. United States*, 91 F.2d 210 (8 Cir., 1937); *United States v. Russo*, 123 F.2d 420 (3 Cir., 1941); *Bacon v. United States*, 127 F.2d 985 (8 Cir., 1942); *United States v. Penn*, 131 F.2d 1021 (2 Cir., 1942); *Caldwell v. United States*, 139 F.2d 121 (5 Cir., 1943).

Indeed, properly considered, there are no suspicious circumstances in this case. The only evidence is that *separate* questions were asked and *separate* answers were given. There is not one word to suggest that there was any agreement or conspiracy as charged in the first count of the indictment.

In view of the history of the prior deportation cases, the assumption that persons closely connected with the labor movement made in 1945 that the case was at an end, and the fact that not one of the three appellants volunteered any statement or representation concerning membership in the Communist Party, it is clear that no agreement or conspiracy was or could have been entered into. If there was or had been a conspiracy such as is charged, it is reasonable to believe that at least one of the appellants at some stage of the proceedings would have volunteered statements or representations concerning membership in the Communist Party. That they did not do so, completely negatives the suggestion that they conspired in advance to do so.

POINT V.

THE THIRD COUNT OF THE INDICTMENT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE AN OFFENSE AGAINST THE UNITED STATES.

(Specification of Errors 4, 5, 19, 20.)

The language of the third count of the indictment is peculiar, ambiguous and confusing. It does not charge, although it gives the impression of charging,

appellants Schmidt and Robertson with having aided and abetted appellant Bridges in the commission of the crime charged in the second count of the indictment. The third count does not and cannot charge the offense of aiding and abetting since nowhere in that count is it charged that appellant Bridges committed any crime. Lacking an allegation to the effect that Bridges committed any crime, the third count fails to state facts sufficient to constitute an offense by Schmidt and Robertson of having aided and abetted. In *Morgan v. United States*, 159 F. (2d) 85 (10 Cir. [1947]), the Court said:

“One cannot aid and abet in the commission of a crime unless there is another who has committed the offense. In other words, one cannot be an aider and abettor of himself in the commission of an offense.” (*Ibid.*, 159 F. (2d) at 87.)

Furthermore, the third count fails to allege who made the “false and fraudulent statements and representations” therein alleged to have been made. From all that appears in the third count, the pleader might just as well have had reference to the statements which Garner testified Schmidt and Robertson made to him on August 8 as to the testimony which Bridges gave on September 17.

If we look to the statutory authority cited in the indictment, we are directed to the provisions of law under which the pleader was presumably trying to charge Schmidt and Robertson. We are informed that this is 8 U.S.C.A. 746(a)(5).

Section 746 of Title 8 was, prior to its repeal by the Act of June 25, 1948, the penal section of the Nationality Act of 1940 and was unique in that it divided and subdivided down to fractional details the conduct by which the purposes of the Nationality Act could be thwarted and made each of such details a separate statutory offense. As a result, each subdivision of Section 746 covered a very narrow and very precisely defined scope of activity. The outer margins of each offense described in Section 746 were held closely together, thus requiring both precise pleading and precise proof.

That this is so is evident from a comparison of Subdivisions (a)(4)c and (a)(4)d of Section 746. Moreover, these subdivisions need to be considered in order to appreciate fully the limitations of Subdivision (a)(5) (on which Count 3 was presumably based).

Paragraphs "c" and "d" of Subdivision (a)(4) read as follows:

"(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship or otherwise, * * *

(4) to encourage, advise, aid or assist any person * * *

c. not then entitled or qualified under this chapter to apply for naturalization or citizenship, to apply for such naturalization or citizenship, with knowledge that such person was not so entitled or qualified; or

d. not then entitled or qualified under this chapter to obtain naturalization or citizen-

ship; to obtain such naturalization or citizenship, with knowledge that such person was not then so entitled or qualified.”

It will be observed that the only difference between Paragraphs “c” and “d” above is that in “c” the words “applied for” are used, whereas in “d” the word “obtain” is used. Thus two separate offenses are created by these two paragraphs, offenses which are identical except for one detail—that one of them deals with encouraging, etc., a person to apply for citizenship under the circumstances specified, and the other makes it a crime to encourage, etc., a person to obtain citizenship under the circumstances described.

It must be observed that in order to plead either of these two offenses, it is necessary to plead first, facts which made the applicant “not then entitled to qualify under this chapter” to apply for or receive citizenship; and second, facts that the person charged had at the time he encouraged, etc., the applicant to apply for or obtain citizenship, “knowledge that such person was not then so entitled or qualified.”

In this connection it must be further noted that the Nationality Act of 1940 (i.e., “this chapter”) does not make membership in the Communist Party “grounds for refusal of naturalization,”¹ and that to charge that Bridges was not “then entitled or

¹Cf. 8 U.S.C.A. 705 with *Schneiderman v. United States*, 320 U.S. 118, 132, *ftnt.* 8 (1943).

qualified under this chapter” to apply for or receive naturalization on account of Communist Party membership, the pleader would have to allege not merely membership in the Communist Party, but that the Communist Party “believes in, advises, advocates or teaches” one or more of the doctrines specified in 8 U.S.C.A. 705 and that Bridges knew this to be so. Moreover, to charge appellants Schmidt and Robertson of either the offense defined in Subdivision (a)(4)c or (a)(4)d above, the pleader would have had to allege knowledge of all of these things by such appellants.

It is apparent from this that the third count of the indictment does not charge the offense defined by either Subdivision (a)(4)c or (a)(4)d of 8 U.S.C.A. 746.

Before considering directly Subdivision (a)(5) of Section 746, we should like to call attention to Subdivision (a)(1) for the purpose of showing first, that the pleader was not attempting to charge Schmidt and Robertson with the offense therein defined; and second, that the offense therein defined is not within the compass of the offense defined in Subdivision (a)(5).

Subdivision (a)(1) reads as follows:

“(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise * * *

(1) knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or

under, or by virtue of any law of the United States relating to naturalization or citizenship.”

It was presumably under this subdivision that the second count of the indictment was drawn. A comparison of the second and third counts of the indictment and a comparison of Subdivision (a)(1) of Section 746 and the third count of the indictment makes it manifest that the third count does not charge Schmidt and Robertson with the offense defined in Subdivision (a)(1) of 8 U.S.C.A. 746.

Subdivision (a)(5) of the section under which the third count of the indictment presumably was drawn reads as follows:

“(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or otherwise * * *

(5) to encourage, aid, advise or assist any person not entitled thereto to obtain, accept, or receive any certificate of arrival, declaration of intention, certificate of naturalization, or certificate of citizenship, or other documentary evidence of naturalization or citizenship—

a. knowing the same to have been procured by fraud;

b. knowing the same to have been procured by the use or means of any false name or false statement given or made with the intent to procure the issuance of such certificate of arrival, declaration of intention, certificate of naturalization, or certificate of citizenship,

or other documentary evidence of naturalization or citizenship; or

c. knowing the same to have been altered in any manner."

It will be observed that the offense so defined is not that of aiding or abetting another in the commission of another offense, but is complete in itself upon the mere advising of another to obtain, accept or receive the documentary evidence described under the circumstances proscribed. To constitute such an offense, however, certain conditions must be met.

The first is that the person so encouraged, etc., be "not entitled thereto". That is, that the person in question be not entitled to the documentary evidence involved. While it is alleged in the third count of the indictment that Bridges was "not then and there entitled thereto", such an allegation is merely the conclusion of the pleader. No facts are alleged which, if true, would show that Bridges was not then and there entitled to the documentary evidence in question.

A second and indispensable element to the offense is that the documentary evidence to be obtained, accepted or received be already in existence. This is made manifest by the use of the words "to have been" contained in each of the clauses "a", "b", and "c" of Subdivision (a)(5). The phrase "to have been" refers to something in the past and not to something in the future. There is no allegation in the third count of the indictment that the certificate of natu-

ralization to which reference is there made was in existence at the time the acts charged to Schmidt and Robertson occurred. On the contrary, by the use of the words "which was to be procured" used in the third count of the indictment in connection with the certificate of naturalization, the pleader negatived the pre-existence of such a certificate. The allegation "and was procured" in juxtaposition with the allegation "which was to be procured" denotes the past only with relation to the time of the indictment but not in relation to the time the offense is alleged to have been committed.

A third essential element of the crime defined by Subsection (a)(5) is that the defendant knew (at the time he encouraged, etc., another to obtain the pre-existing documentary evidence) that such evidence had theretofore been procured (a) by fraud; (b) by the use of false statements; or (c) had been altered. And in the case of (b) (i.e., where the defendant is charged with knowing that the documentary evidence had been procured by the use of a false statement), it is also an ingredient of the crime and therefore must be alleged that the defendant knew that the false statement had been made "with the intent to procure the issuance" of such documentary evidence. The third count of the indictment fails to allege any such knowledge of pre-existing facts by either Schmidt or Robertson.

To recapitulate: The third count of the indictment fails to state facts sufficient to constitute the offense defined by Subdivision (a)(5) of 8 U.S.C.A. 746 in

that first, it fails to allege facts sufficient to show that Bridges was not then entitled to obtain a certificate of naturalization; second, it fails to allege that at the time the offense was alleged to have been committed there was in existence a certificate of naturalization which could have been accepted or received by Bridges; and third, it fails to allege that Schmidt and Robertson or either of them had any knowledge that such a certificate (if it were in existence) had been procured by fraud or had been procured by the use of any false statements made with the intent to procure the issuance of such a certificate (or—although we assume the government is not relying on clause “c”—had been altered in any manner).

The third count of the indictment is in reality a hodge-podge of allegations, some of which have relation to the elements of the offense defined in Subdivision (a)(1) of 8 U.S.C.A. 746, some of which have relation to the offense defined in Subdivision (a)(4)c of that section, some of which have relation to the offense defined in Subdivision (a)(4)d thereof, some of which have relation to the offense defined in Subdivision (a)(5)a thereof, some of which have relation to the offense defined in Subdivision (a)(5)b thereof, and some of which, finally, have relation to the offense of aiding and abetting the commission of the offense defined in Subdivision (a)(1) thereof. But the third count of the indictment fails to include all of the elements of any one of these offenses. What the pleader attempted to do was to construct and plead a new offense, an offense not found in any

statute, by selecting and commingling the elements of a number of statutory offenses. However, since as we pointed out at the outset, the various subdivisions of Section 746 of Title 8 were all carefully drawn and delineated to set up a series of separate and distinct offenses, and since the only crimes involved here are statutory and not "common law" crimes, we submit that the third count of the indictment does not state facts sufficient to constitute an offense against the United States.

POINT VI.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANTS SCHMIDT OR ROBERTSON, OR EITHER OF THEM, OF THE OFFENSE CHARGED IN THE THIRD COUNT OF THE INDICTMENT.

(Specification of Errors 4, 5, 19, 20.)

By making this point we are not waiving the point that the third count fails to state facts sufficient to constitute an offense. For whether it does or does not do so, the evidence is insufficient to sustain the conviction of either Robertson or Schmidt under that count.

This is so for each of the following reasons:

1. The record contains no evidence that a *certificate of naturalization* was ever issued to or in the name of appellant Bridges. The last step in the naturalization proceeding of appellant Bridges shown by the record is the judgment of the Superior Court of

the State of California, dated September 17, 1945, admitting 18 or 19 persons, including as the third named person Harry R. Bridges, to citizenship. (U.S. Ex. 4; Tr. 551-553.) Such judgment, of course, relating to a number of persons is not and was not the certificate of naturalization of appellant Bridges. (See 8 U.S.C.A. 734-736.)

2. The record contains no evidence that the appellant Bridges ever applied for or obtained, or accepted, or received a *certificate of naturalization*.

3. The record contains no evidence that appellants Robertson or Schmidt, or either of them, ever either knowingly or unknowingly encouraged or aided, or advised, or assisted appellant Bridges either to apply for or to obtain, accept or receive a *certificate of naturalization*.

4. The record contains no evidence that prior to the completion of all the services rendered by appellants Schmidt and Robertson to appellant Bridges (which services were completed on September 17, 1945, at that instant when the clerk of the Court and the Court itself excused them from further attendance—that is, *before* appellant Bridges testified on his own behalf) that appellant Bridges was for any reason, statutory or otherwise, not entitled to apply for and receive naturalization, or that appellants Schmidt and Robertson, or either of them, knew that appellant Bridges was for any reason, statutory or otherwise, not entitled to apply for and receive naturalization.

5. The record contains no evidence that prior to the completion of all the services rendered by appellants Schmidt and Robertson to appellant Bridges, as aforesaid, that appellants Schmidt and Robertson, or either of them, had any knowledge that either the naturalization of appellant Bridges or the issuance of a certificate of naturalization to appellant Bridges *had been procured by fraud or had been procured by the use or means of any false name or any false statement used or made with intent to procure such naturalization, or that such certificate of naturalization had been altered in any way.*

6. The record contains no evidence that appellants Schmidt and Robertson, or either of them, aided or abetted appellant Bridges in the commission of the charge against appellant Bridges in the second count of the indictment.

Of the foregoing points those numbered 1, 2, 3 and 6 are self-explanatory. There simply is no evidence in the record to support any conclusion contrary to that asserted above.

As far as points 4 and 5 are concerned, it is only needed to be called to the Court's attention our previous reference to *Schneiderman v. United States*, *supra*, and its relationship to 8 U.S.C.A. 705; and further to direct the Court's attention to the fact that the trial judge in his charge instructed the jury as follows:

“The aims, purposes and objectives of the Communist Party are not in issue under the indictment as framed, nor is it incumbent upon

the Government to prove to a moral certainty and beyond a reasonable doubt that one of the asserted aims or purposes was to overthrow the government by force and violence.

“That issue is entirely immaterial to any ultimate consideration under the evidence as to the guilt or innocence of Harry Bridges and co-defendants J. R. Robertson and Henry Schmidt.” (Tr. 7889.)

In further support of the contention made in this point, we refer the Court to the authorities cited by us under Point IV.

POINT VII.

THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR IN QUESTIONING THE DEFENSE WITNESS FATHER PAUL MEINECKE AND IN MAKING STATEMENTS IN THE PRESENCE OF THE JURY CONCERNING HIS PURPOSE IN ASKING CERTAIN OF THE QUESTIONS WHICH HE ASKED FATHER MEINECKE.

(Specification of Errors 15, 16, 17.)

In the Briefs for Appellant *MacInnis v. United States of America*, No. 12,599 in this Court, the prejudicial misconduct of Judge Harris in questioning the defense witness Father Paul Meinecke, and in making statements in the presence of the jury concerning his purpose in asking those questions, is gone into in considerable detail and in such a way as to reveal that the purpose of Judge Harris in questioning Father Meinecke was to discredit that testimony, to destroy it in the minds of the jury, to deprive the defendants of its benefit and to do so not by any attack upon the

honesty or sincerity of Father Meinecke but by telling the jury in effect that among the facts surrounding Father Meinecke which he, Judge Harris, had a desire to provide to the jury was the fact that Father Meinecke was unbalanced upon the particular subject on which he testified.

We herewith adopt as a part of this brief and incorporate herein by reference that portion of the argument in the Opening Brief for appellant in *MacInnis v. United States*, *supra*, commencing with the subtitle "Summary of Background Facts" on page 8 and extending to the subtitle Six as quoted on page 49, and all of the argument, including the authorities cited, in Reply Brief for appellant in the said case of *MacInnis v. United States*.

To tie such argument into the present record we contend that the following questions asked by Judge Harris of Father Meinecke, and the following statements by Judge Harris in the presence of the jury concerning his purpose in asking such questions, constituted prejudicial misconduct:

A. The question, "Did you receive a subpoena to attend this court?" (Tr. 4379), and the following explanation, "* * * I think the first question I asked him was whether or not he was subpoenaed. That was overlooked. I think in fairness to Father Meinecke it was a question that should have been asked showing his purpose in coming here." (Tr. 4385-4386.)

The said question and the said explanation inferred that some onus or stigma attached to a person who

came forth voluntarily to give testimony favorable to appellants, and that the question had been asked to give Father Meinecke the opportunity to relieve himself of that onus or stigma by testifying that he was present under the compulsion of subpoena, as more fully explained on pages 21-22 of the Opening Brief for appellant in *MacInnis v. United States, supra*.

B. The series of questions commencing with "Did you arrive here today, Father, this morning?" through "You are rather complimentary. After you spent the evening there and enjoyed the social activities, then you had a discussion concerning the testimony that might be given in this case?" (Tr. 4379.)

Such questions inferred that figuratively speaking Bridges, MacInnis and Father Meinecke were as three cards out of the same deck, having different faces but the same back, substance and texture, or in other words, that Father Meinecke was something less than a free, independent and responsible witness and while the voice was his, the words were appellants' and the testimony was that of Bridges himself, as more fully explained on pages 40-41 of the Opening Brief for appellant in *MacInnis v. United States, supra*.

C. The questions "Do you have difficulty, Father, with your memory or recollection under ordinary conditions?" and "In San Francisco, Father, you were perfectly conversant and well oriented, weren't you, with respect to dates and the like?", and "Since you went to Nevada your orientation has become poor, has it?", and "Have you been recently subjected to

medical treatment, Father?" (Tr. 4380, 4381), together with that portion of Judge Harris' explanation to the jury concerning his purpose in asking such questions, commencing at the bottom of page 4386 of the record with the words, "Latterly in my examination of Father Meinecke", etc., and ending with the sentence, "Very many people have to leave large metropolitan areas to go to less burdensome parishes and that was the reason underlying my question". (Tr. 4387.) Such questions and explanation had the effect of telling the jury that Father Meinecke had an insane delusion on the subject of whether appellant was a member of the Communist Party, as more fully explained in the Opening Brief for appellant in *MacInnis v. United States, supra*, pages 12-32, inclusive.

D. The question, "Have you been recently subjected to medical treatment, Father?" (Tr. 4379.) This constituted prejudicial misconduct particularly in view of the previous ruling by Judge Harris (with respect to the witness Crouch [Tr. 2697] and with respect to the witness Michener [Tr. 3559]) that such a question was improper in that the answer might tend to degrade the witness and that the only purpose for which such a question could be asked was to obtain an answer which would degrade the witness, as more fully explained in the Opening Brief for appellant in *MacInnis v. United States, supra*, at pages 33-37.

E. The statements by Judge Harris, "Mr. MacInnis invited it" and "Mr. MacInnis invited me to

ask the question". (Tr. 4381.) These constituted prejudicial misconduct in that such statements were false as a matter of official record and had the effect of telling the jury that Mr. MacInnis, the attorney for appellants Schmidt and Robertson, was lying and was trying to deceive them, and in that by so telling the jury, they had an irresistible tendency completely to discredit Mr. MacInnis in the minds of the jury and thereby wrongfully and unconstitutionally to deprive appellants Schmidt and Robertson of his effective services as counsel, as more fully explained in the Reply Brief for appellant in *MacInnis v. United States, supra*, pages 5-6.

In support of our contentions under this point, we cite this Court's decision in *Williams v. United States*, 93 F.2d 685 (9 Cir., 1937), and the cases therein cited, and quoted from, including *Adler v. United States*, 182 F. 464 (5 Cir., 1910); *Frantz v. United States*, 62 F.2d 737 (6 Cir., 1933); *Hunter v. United States*, 62 F.2d 217 (5 Cir., 1932).

Quercia v. United States, 289 U.S. 466 (1933) and *Glasser v. United States*, 315 U.S. 60 (1942), together demonstrate that by his attitude toward counsel, a trial judge may, as we submit he did here, in effect deprive a defendant of "untrammelled and unimpaired"¹ assistance of counsel.

¹*Glasser v. United States, supra* at 70.

POINT VIII.

THE TRIAL COURT ERRED IN REFUSING TO ADMIT IN EVIDENCE THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN *BRIDGES v. WIXON*, 326 U.S. 135, IN RELATION TO AND IN EXPLANATION OF THE TESTIMONY OF APPELLANTS SCHMIDT AND ROBERTSON TO THE EFFECT THAT THEY HAD READ SAID DECISION AND IN PART ON THE BASIS THEREOF HAD COME TO THE CONCLUSION THAT APPELLANT BRIDGES WAS NOT AND NEVER HAD BEEN A MEMBER OF THE COMMUNIST PARTY IN THE UNITED STATES.

(Specification of Errors 10, 19, 20.)

Appellant Schmidt testified that he based the answers which he gave in the naturalization proceeding of the defendant Bridges upon two things: first, his own knowledge and association with the defendant Bridges over the years; and, second, upon his own reading of the opinion of the Supreme Court of the United States. (Tr. 4225-6.) As soon as such testimony was given, there was offered in evidence defendants' Exhibit B for identification, being the decision of the Supreme Court of the United States in the case of *Bridges v. Wixon*, October Term 1944. (Tr. 4226.) Objection was immediately made to the introduction of such decision in evidence, which objection was immediately sustained.

Appellant Robertson testified that prior to giving testimony in the naturalization proceeding of appellant Bridges he read the decision of the Supreme Court of the United States and identified defendants' Exhibit B for identification as the decision to which he referred, and that he based his opinion that Harry

Bridges was not a member of the Communist Party in part upon his own observations and knowledge of Harry Bridges and in part upon the decision of the Supreme Court of the United States. The defendants' Exhibit B for identification was again offered in evidence, and again rejected. (Tr. 4617.)

The following cases make it clear that the refusal to permit the introduction into evidence of the decision of the Supreme Court in connection with the aforesaid testimony of appellants Schmidt and Robertson constituted reversible error:

Potter v. United States, 155 U.S. 438 (1894);
Harrison v. United States, 200 Fed. 662 (6 Cir., 1912);

Buchanan v. United States, 233 Fed. 257 (8 Cir., 1916);

Hyde v. United States, 15 Fed. (2d) 816 (4 Cir., 1926);

Miller v. United States, 120 Fed. (2d) 968 (10 Cir., 1941).

POINT IX.

THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR IN READING IN THE PRESENCE OF THE JURY THE STATEMENT OF HIS REASONS FOR REFUSING TO PERMIT COUNSEL FOR THE DEFENSE TO CROSS-EXAMINE GOVERNMENT WITNESS KESSLER CONCERNING HIS ACTIVITIES IN CONNECTION WITH THE PREPARATION OF THE CASE AGAINST THE DEFENDANTS.

(Specification of Error 18.)

Only two agents of the Bureau of Naturalization were produced as witnesses for the Government. One was Naturalization Examiner Garner, the Government's first witness, and the other was Lawrence R. Kessler, who testified on January 12, 1950. (Tr. 3578, 3583.) The Government rested its case on January 16, 1950. (Tr. 3663, 3671.) In other words, and we want to make this unmistakably clear, Kessler testified before so much as a single witness for the defense was called.

The direct examination of Kessler was exceedingly brief, and on casual examination might seem to have been on an insignificant factual point. Actually that testimony had a very important purpose to serve. To understand that purpose and its importance the background facts need to be stated.

One of the witnesses by which the Government attempted to prove that appellant Bridges had been a member of the Communist party was Lewis Michener, Jr. One of the important items of his testimony in that respect pertained to an alleged Communist Party meeting in the Sunset District in San Francisco in

the year 1940, which meeting, according to Michener, was attended by Communist Party members only, was attended by Bridges, and dealt with Communist Party affairs. The date of such alleged meeting was important, for if it was held on a day or during a period when Bridges could be proven not to have been in San Francisco Michener's testimony concerning that meeting, and indeed his entire testimony, would thereby be discredited.

In 1940 Michener resided in Southern California. The dates of his visits to San Francisco could therefore be established by his hotel registrations in San Francisco.

On direct examination Michener testified that on the occasion of that alleged Communist Party meeting in the Sunset District he stopped at the Shaw Hotel in San Francisco and that that meeting was held "late in 1940". (Tr. 3343.) On cross-examination he said that it was held "in the latter part of 1940". (Tr. 3475, 3477.) He was then shown a photostatic copy of his registration card at the Shaw Hotel dated *February* 9, 1940 (Tr. 3480) and such registration card was offered in evidence. (Tr. 3481.) Counsel for the Government objected to the introduction of such registration on the ground that "he might have stopped there a half dozen times in 1940". Whereupon counsel for the defense stated, "We will show that it is the *only* registration of L. H. Michener or Lewis Michener in 1940 at the Shaw Hotel." (Tr. 3481.)

The following day, on redirect examination, Michener testified that the aforesaid meeting was held "in late 1940. I couldn't exactly tell you the exact time." (Tr. 3566.) *Government counsel then showed him a registration card of the Shaw Hotel bearing an August 1940 date (Tr. 3566), which he identified as his registration. (Tr. 3567.)*

Counsel for the Government then undertook to explain that immigration officers investigating at the Shaw Hotel had located that card and realizing its importance, had asked the hotel to keep it in a safe place and that they had placed it in the hotel safe, and that probably when investigators for the defendants went through the registration files they did not see that card (because it was in the hotel safe rather than in the registration files.) (Tr. 3567.)

The Court then asked for evidence on that point. (Tr. 3567-8.) An assistant manager of the hotel was produced who testified that a Mr. Kessler, a Government agent, borrowed that card on October 6 (1949), returned it several days later, and had re-borrowed it "yesterday, I think—or today" or "a couple of days ago". (Tr. 3574-5.)

Kessler was then put on the stand. He testified that he obtained the card October 5 "last year" (1949) and returned it October 7 or 8, 1949 and "I next saw the card this morning. I went over to the hotel this morning about 8:30 I saw Mrs. Elliott, and she gave me the card this morning." (Tr. 3579-80.)

It will be observed that the purpose of Kessler's testimony was to establish that the prosecution had not been in possession of that registration card when Michener was under direct examination. Its purpose thus was to rebut an inference that the prosecution had sequestered and concealed that card to prevent the possible discrediting of Michener in the event his testimony concerning the alleged meeting was shown to be false.

The date on that registration card was August 26, 1940 (Tr. 3588), which certainly was not "late in 1940" as testified to by Michener both on direct and redirect examination, and only by unreasonable extension could it be said to be in the "latter part of 1940" as testified to by Michener on cross-examination. Had the prosecution sequestered and concealed that registration card to prevent the defendants from discovering its date, the prosecution would have been without good faith or integrity in the matter. If the prosecutors knew of that card and of its date at the time they permitted Michener to fix the time of the alleged Communist meeting as "late in 1940", they were chargeable with being parties to the introduction of inaccurate and deceptive evidence.

Thus the purpose of Kessler's testimony was to bolster up the good faith of the prosecution and the prosecutors. *That was its only purpose.* Moreover, if Kessler was not himself a credible witness—that is, if he could be shown not to be a credible witness—that purpose would fail.

At the commencement of the cross-examination of Kessler, defense counsel stated that he intended to put a great many questions to Kessler relating to his activities in the case. Whereupon the trial judge stated: "Counsel, *I shall limit the cross-examination of this witness* at this stage of the proceedings to matters pertaining to this card and no other matters." (Tr. 3580.) After a short discussion, in which the trial judge again stated in effect that no cross-examination to test the credibility of the witness would be permitted, the noon recess was taken. (Tr. 3581-2-3.) That afternoon defense counsel asked Kessler the following question:

"Now, let me ask you whether in May, 1949, accompanied by an agent Meyers—or whether you accompanied that agent named Meyers, and went to visit a man named Herman Mann,—* * * and then and there offered to Mr. Mann that you would procure the services of the United States Cancer Research to cure his dying wife if he would come and testify against Bridges. Did you, Mr. Kessler?" (Tr. 3605-6.)

An objection was interposed. In ruling, the trial judge *read from a written memorandum*, as is clearly indicated by the subsequent statement of the trial judge that certain language in that ruling " * * * unfortunately crept into *the note*." (Tr. 3610.)

The ruling of the trial judge (as so read *to the jury*) was as follows:

"The Court. My examination of authorities, of the authorities during the noon hour, Mr. Hal-

linan, would justify me in the reassertion of the rule which I think is sound, (1), that the cross-examination in the main is limited to that which is elicited and brought out in chief, on direct; secondly, that the discretion vests in the trial court with respect to the limitations upon that cross-examination. The matter elicited on direct examination had to do with a card. I have allowed you full and complete scope in and with respect to the card, all the surrounding circumstances, the conversation had with the agents and the attorneys. You have been permitted to state to the jury, before my admonition, in connection with the characterization about this card. I have admonished the jury to disregard your statement.

For your information, I reviewed the following authorities and you might note them in your book——

Mr. Hallinan. Pardon me, if I may.

The Court. ——so you may have them hereafter.

United States v. Toner, 173 Fed. 2d 140 at 144. The language of Justice Stone in the Supreme Court decision of Alford v. United States, 682, 687, wherein Justice Stone said, in part:

‘There is a duty to protect him (that is the witness) from questions which go beyond the bounds of proper cross-examination merely to harass, annoy and humiliate him.’

The case of United States v. Easterday, 57 Fed. 2d 165 at 166. This is United States v. Easterday, E-a-s-t-e-r-d-a-y, at 57 Fed. 2d 165, at 166. And this is Justice Learned Hand, speaking for the Circuit Court:

‘Cross-examination does not extend to aimless shots at random; a trial presupposes rational process applied to the testimony uttered. The judge was not bound to allow what otherwise had no bearing on the witness’ credibility.’

Then in *Morton v. U. S.*, at 60 Fed. 2d 696, at 699. *And the language used in this Morton case is somewhat reminiscent of your expectation or hope that some error might be created in the record.*¹ The Court said——

Mr. Hallinan. It is no hope, Your Honor; I hope no error will be created. I tried to argue Your Honor into permitting the evidence in.

The Court. I am trying my level best to keep error out of the record.

The Court then said:

‘The battle continued, not to ascertain the truth, but in the evident hope that error might be injected into the record and ultimate conviction thereby avoided. But avoidance of a conviction upon uncontradicted evidence, establishing to a certainty the guilt of the accused, * * *’ and so forth. Then the Court concluded:

‘Nevertheless, the ascertainment of the truth by means of a fair trial, rather than the slavish devotion to the rules of the game, is the determinative factor in ascertaining the existence of prejudicial error.’

I also referred to the *Gerson* case, *Gerson v. U. S.*, 88 Fed. 2d 358, at 361:

‘The extent of cross-examination with respect to an appropriate subject of inquiry is within

¹Remember, this was said *in the presence of the jury.*

the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted.' '' (Tr. 3607-3610.)

By the quotation from the *Morton* case, coupled with the introductory remark relating it to the conduct of defense counsel, the trial judge told the jury:

(1) That the question asked of Kessler was not asked to ascertain the truth, (2) but was asked in the hope of injecting error into the record and (3) to avoid a conviction which should result from (4) uncontradicted evidence (5) establishing to a certainty the guilt of the accused.

If this was not prejudicial misconduct, and flagrant prejudicial misconduct, then there is no such thing as prejudicial misconduct. If this does not constitute reversible error, then there is no such thing as reversible error.

What the *Court of Appeals* said in the *Morton* case was said *after the trial was completed, the verdict of guilty was returned, the judgment of conviction was pronounced, and the case reached the higher Court*. It was said in deciding whether error committed at the trial was or was not prejudicial in view of the entire record of the trial. It could not have had any effect on the minds of the jury or have contributed in any way to their verdict.

What the trial judge said in quoting from the *Morton* case was said before even the case in chief of the prosecution was complete, and at a time when it was impossible for anyone to say that at the termi-

nation of the trial the evidence would be uncontradicted or that it would establish to a certainty, or to any other degree, the guilt of the accused. Moreover, it would have been improper for the trial judge at any stage of the trial prior to the rendition of verdicts by the jury, to have said in the presence of the jury that the evidence established "to a certainty the guilt of the accused."

Moreover, what the trial judge said in quoting from the *Morton* case not only could have had an effect upon the jury, but quite obviously was designed and intended to have such an effect. Certainly the quotation from the *Morton* case had not "crept into the note" which the judge was reading; it had been inserted in that note by the judge. Certainly the judge must have realized that his reading of that quotation in the presence of the jury would have had a powerful effect upon the jury. That quotation was wholly unnecessary to the ruling which the judge was making, and at the stage of the trial in which it was read it was not even in point as a matter of law—that is, it was not even germane to the ruling.

It is our conviction and we contend:

(1) That the insertion of the quotation from the *Morton* case in the "note" made it appear to the jury that an Appellate Court had condemned questions such as put by defense counsel in the *Bridges* case as having been put in bad faith and thus not only justified but compelled the ruling of the judge in sustaining the objection to the question.

(2) That the insertion of the quotation from the *Morton* case in the “note” broke up and destroyed the legitimate attack which defense counsel were making on the prosecution and the witnesses for the prosecution and upon the case of the prosecution, and resulted in a counter-attack by the judge upon defense counsel and upon the appellants themselves.

(3) That the insertion of the quotation from the *Morton* case in the “note” made unmistakably clear to the jury that the trial judge was convinced that the defendants were guilty and should be convicted and that their defense was a sham and was despicable and should be ignored and rejected by the jury.

Moreover, the second of the two quotations from the *Morton* case, namely, the quotation reading

“Nevertheless, the ascertainment of the truth by means of a fair trial, rather than the slavish devotion to the rules of the game, is the determinative factor in ascertaining the existence of *prejudicial* error.”,

indicates quite conclusively that in making his ruling the judge realized that according to “the rules of the game”—that is, according to the rules of evidence—the question to which he was then sustaining an objection was a proper question, that he was committing error in sustaining the objection to that question, and that he was counting upon this Court to sustain him in that ruling by holding that his ruling, *although erroneous*, was not prejudicial. Certainly a trial judge ought not consciously to commit error—even though he

thinks it may not be “prejudicial”. At the least this indicates an attitude on the part of the judge which is not consistent with the high role he is called upon to play.

That the question was asked in good faith is revealed by the affidavit of Herman Mann (Defendants’ Exhibit K-1 for identification). This was submitted to the trial Court by way of an offer of proof to show that appellants legitimately sought to discredit Kessler as a witness by evidence of his wrongful conduct in connection with the preparation of the case against them. (Tr. 3612-3-4.) That the trial judge’s statement of his reasons for sustaining the objection to the question, made in the presence of the jury, constituted prejudicial misconduct and reversible error is made manifest by this Court’s decision in *Williams v. United States*, 93 Fed.2d 685 (9 Cir., 1937) and by the following cases therein cited and quoted from:

Adler v. United States, 182 Fed. 464 (5 Cir., 1910);

Hunter v. United States, 62 Fed.2d 217 (5 Cir., 1932);

Frantz v. United States, 62 Fed.2d 737 (6 Cir., 1933);

Quercia v. United States, 289 U.S. 466 (1933).

The record discloses that as soon as the trial judge concluded the foregoing statement in the presence of the jury the following occurred:

“Mr. Hallinan: Your Honor, at this time, because of the citation of certain language in one

of these cases, which might—I hope not—be a reflection upon me——

The Court: That language may be stricken from the record and I advise the jury to disregard it. It unfortunately crept into the note.

Mr. Hallinan: I move for a mistrial, Your Honor, on the ground that the statement of the Court is manifestly prejudicial. Now, I mean, the mere fact that Your Honor read it and has stricken it out——

The Court: The motion for a mistrial is denied.” (R. 3610.)

Observe how quickly the trial judge recognized that his quotation from “one of these cases” had been improper. Observe also that the trial judge’s order striking “that language” from the record and his “advise”-ing the jury to disregard it did not inform the jury what language was being stricken, nor did it direct or admonish or instruct the jury to disregard any specific language. This exceedingly weak gesture of correction corrected nothing. Indeed, the statement of the trial judge was of such a character that the error was beyond correction other than by the declaration of a mistrial. The motion for a mistrial should have been granted, and we submit this error alone necessitates a reversal of all verdicts and judgments of conviction involved on this appeal.

POINT X.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN THE GIVING OF INSTRUCTIONS TO THE JURY AND IN THE REFUSAL TO GIVE INSTRUCTIONS REQUESTED BY THE DEFENDANTS.

(Specification of Errors 13, 14.)

PRELIMINARY STATEMENT.

Quite a few of the prejudicially erroneous instructions given by the trial Court to the jury were not objected to by counsel for the defendants in compliance with the requirements of Rule 30 of the Federal Rules of Criminal Procedure. Such instructions, however, constituted "plain error" under Rule 52(b) of those rules and for that reason were not only reviewable on this appeal but should be reviewed on this appeal.

Wiborg v. United States, 163 U.S. 632 (1896) ;

United States v. Ausmeyer, 152 F.2d 349
(2 Cir., 1945) ;

Anderson v. United States, 157 F.2d 429 (9
Cir., 1946) ;

United States v. Perplies, 165 F.2d 874 (7 Cir.,
1948) ;

Jones v. United States, 175 F.2d 544 (9 Cir.,
1949).

Most of the instructions given by the trial Court in its charge to the jury were given by the trial Court of its own volition and defense counsel were not, prior to the giving of that charge, aware of them. The errors in those instructions were so numerous that to detect and specify the legal defects in all of those in-

structions or even in a substantial portion of them *as they were being read to the jury* and at the same time to continue to listen to the instructions being read would have been like trying to recognize and locate and measure and record the individual lashing drops of rain during the height of a hurricane. This is true particularly because the charge went from one subject to another and back again in such a random fashion, dispersing the several instructions on each particular subject throughout the charge as a whole, so that the correlation of those instructions as they were being read was a practical impossibility. Moreover, as we will show in the case of several of the instructions proposed by the prosecution and given by the trial Court, the prosecution had annexed thereto misleading and deceptive case citations which only lengthy research could have unmasked and thus those instructions were imposed upon defense counsel and possibly upon the trial Court by the prosecution.

I. INSTRUCTIONS ON REASONABLE DOUBT.

The first instruction to which we call attention falls in this category. It was the prosecution's proposed instruction No. 1 (Tr. 319, 7885-7886), Specification of Error No. 13(j), *supra*. The citation at the bottom of that instruction as proposed by the prosecution reads as follows:

“(Charge of Murrah, D.J., W.D. Okla., *Pietch v. United States*, 110 F.(2d) 817 (C.C.A. 10; cert. den. 310 U.S. 648.)”

There is no mention of such an instruction in the reported case of *Pietch v. United States*, 110 F.2d 817. We have had the clerk of this Court procure from the clerk of the Court of Appeals for the Tenth Circuit the record and the briefs in that case. An inspection of that case reveals that while Judge Murrah did give such an instruction in that case, *no point was made thereof on appeal*. In other words, the prosecution "got by" with such an instruction in the *Pietch* case and as far as the trial Court is concerned, "got by" with it on this case.

And, "got by" is the proper term.

The instruction commences:

"The term reasonable doubt means a doubt *for which a good reason can be given* in the light of the evidence * * *"

This and other Courts have withheld approval of an instruction to the effect that a reasonable doubt was a doubt for which a reason could be given.

Owens v. United States, 130 Fed. 279 (9 Cir., 1904);

Griggs v. United States, 158 Fed. 572 (9 Cir., 1908);

United States v. Woods, 66 F.2d 262 (2 Cir., 1933).

In our case, "a reason" is changed to "a *good* reason". The addition of the word "good" makes the instruction much more erroneous and much more prejudicial—indeed, it makes the instruction inescapably prejudicial. It changes the entire tenor of the rea-

sonable doubt doctrine, making of it a *positive obstacle to be overcome by the defendant* instead of a stout staff to be wielded in the defendant's favor. In effect it places on the defendant the burden of presenting and establishing to the jury's satisfaction "a good reason" for not convicting him or else suffer conviction.

A reasonable doubt is a doubt and nothing more. It is a doubt based upon reason and not one springing from fancy, but is still a doubt, an uncertainty, a negative thing.

Conversely, "a reason", and particularly "a *good* reason" is a positive thing, an affirmative thing, not only much more than a doubt but the very opposite from a doubt.

The trial Court in this case went much further than District Judge Murrah did in the *Pietch* case, *supra*, for in addition to giving an instruction as requested by the prosecution, Judge Harris instructed the jury as follows:

"Remember that the defendant or defendants are entitled to any reasonable doubt, *as defined*, that you may have in your minds; but at the same time also remember that if you have *no such doubt*, the government is entitled to a verdict." (Tr. 7886.)

This compounded the error of the instruction as proposed by the prosecution. It emphasized that error. It demanded of the jury that they have a good reason for acquitting the defendants and that in the

absence of such an affirmative thing as a good reason, they convict the defendants because lacking such a good reason, "the government is *entitled* to a verdict." The prosecution's proposed instruction No. 1 was the only instruction given by the trial Court in which any attempt was made to define the term "reasonable doubt", so that such instruction was not "corrected" by any other instruction.

The defendants proposed two instructions on the doctrine of reasonable doubt, viz., Defendants' Proposed Instructions Nos. 76 and 78, both of which were refused as "covered elsewhere". (Tr. 289-290.) They were covered elsewhere only by an instruction in direct conflict with them.

The refusal to give such two instructions are assigned in Specification of Error No. 13A(g) (No. 76 and No. 78), pages 40-41, *supra*.

Defendants' Proposed Instruction No. 76 was expressly approved by the Supreme Court in *Holt v. United States*, 218 U.S. 245 (1910). The refusal to give Defendants' Proposed Instructions Nos. 76 and 78 in the absence of instructions to the same effect constituted prejudicial error.

II. INSTRUCTIONS ON CREDIBILITY OF WITNESSES.

Another instruction proposed by the prosecution under a misleading and deceptive citation was the prosecution's proposed instruction No. 3 (Tr. 320-321) given by the trial Court (Tr. 7869-7870), Speci-

fication of Error No. 13(d), page 21, *supra*. The citation under that instruction as proposed by the prosecution was in these words:

“(Charge of Dawkins, D.J., W.D. La., *Leche v. United States*, 118 F.(2d) 246; cert. den. 314 U.S. 617.)”

The cited decision makes no mention of such an instruction and an examination of the records and briefs in that case reveal that although such an instruction was given, *no point was made thereof on appeal*; in other words, it was another instance where the prosecution “got by”. This instruction was one relating to the credibility of witnesses in general. Its vice is partly due to a statement therein made but mainly because of the contrast between that statement and another instruction given by the trial Court in relation to the credibility of the defendants as witnesses. In other words, two quite different standards were set up, one applicable to witnesses for the prosecution and the other applicable to the defendants who were their own main witnesses, to the great prejudice of the defendants. The objectionable statement contained in this instruction reads as follows:

“If the witness has the appearance of attempting to the best of his ability to tell the truth, and other circumstances tend to establish that situation, then you give full credit to his testimony.”

Thus the instruction of witnesses in general which would include all of the witnesses for the prosecution, was to be based upon “the *appearance*” of the witness “of *attempting* to the *best* of his *ability* to tell

the truth", in which case the jury shall "*give FULL credit to his testimony*", i.e., to all of his testimony.

As applied to witnesses for the prosecution, what does this leave of the presumption of innocence and the doctrine of reasonable doubt? Virtually nothing, for if *appearance of attempting* to tell the truth is sufficient to give *full credit* to *all* the testimony of such witnesses, then the presumption of innocence is displaced by a presumption of guilt where *any* of that testimony (to which full credit is to be given) is indicative of guilt.

Contrast the foregoing instruction with the prosecution's proposed instruction No. 10 (Tr. 324-325), given by the trial Court (Tr. 7874), Specification of Error No. 13(f), *supra*, pages 22-23. That instruction reads as follows:

"You should look to the interest which the respective witnesses have in the trial or in its results. Where the witness or witnesses has or have a direct personal interest in the result of the trial, the temptation is strong to color, pervert or withhold the fact. The law permits the defendant at his own request to testify in his own behalf. The defendants have availed themselves of this privilege. Their testimony is before you and you must determine how far it is credible. The deep personal interest they have in the result of the trial should be considered by the jury in weighing their evidence in determining how far or to what extent it is worthy of credit. The fact that one is a defendant does not condemn it as unworthy of belief, but at the same time it creates an interest greater than that of any other

witness, and to that extent affects the question of credibility.

“It is a familiar rule that the relations of a witness to the matter to be decided are legitimate subjects of consideration in respect to the weight to be given to his testimony.”

It was true that the defendants had a deep personal interest in the results of the trial, but how could the trial judge know *either as a matter of fact or as a matter of law* (and to warrant an instruction to that effect he must have known it as a matter of judicial knowledge) that the fact that the defendants were defendants *created* in them an interest *greater* than that of *any other* of the witnesses?

Thus the credibility of the witnesses for the prosecution was to be measured by *appearances of attempts* to tell the truth, whereas the credibility of the defendants was to be measured by their *deep* and *greater* personal interest in the outcome of the trial. The scales were not evenly balanced; they were heavily weighted against the defendants and in favor of the witnesses for the prosecution.

Nor is this the worst of it. The matter of credibility as opposed to non-credibility related, and related only, to probable truth-telling as opposed to probable falsification. If the defendants were innocent, they had no reason to falsify. It was only if they were guilty that they would have had reason to falsify. The fact that they were defendants did not make them guilty. The fact that they were defendants alone

did not "create" in them a "greater" reason or temptation to give false testimony than reasons and temptations which may have actuated the witnesses for the prosecution to give false testimony. Yet such was clearly and unmistakably the implication of the instruction given by the trial Court.

Indeed, that instruction, in practical effect, told the jury to assume that the defendants were guilty (that is, that they had reason and temptation to give false testimony) in determining "how far and to what extent" their testimony was "worthy of credit" and then, having assumed that they were guilty for the purpose of passing upon the credibility of their testimony, to decide whether they were in fact guilty. This completely negated the presumption of innocence. It clearly constituted prejudicial error.

III. INSTRUCTIONS RE DISCREPANCIES AND CONFLICTS.

The two instructions given by the trial Court on the subject of credibility of witnesses above discussed should be considered in connection with the following instruction given by the trial Court of its own volition (Tr. 7872-3) and set out in Specification of Error No. 13(e), *supra*, pages 21 and 22:

(e) If you should find that there are discrepancies or inconsistencies existing in the testimony of any witness or between the testimony of any witnesses, or if you should find yourself disagreeing over various issues, real or apparent, you should then ascertain whether or not such dis-

crepancies or inconsistencies or such points of difference affect the true issue in this case. Examine such discrepancies or inconsistencies and such disputed points and ask yourselves these questions: How does the decision of this or that or the other discrepancy or other matter in dispute affect the guilt or innocence of the defendants? Regardless of what may be the truth concerning such discrepancies or inconsistencies, ask yourselves the main question: Did or did not the defendants commit that charges or acts as alleged in the indictment? Is such discrepancy or such disputed point material to establish the main and material issue of fact as to the guilt or innocence of the defendants? If they are not material, if the decision of the same is not necessary to enable you to arrive at the guilt or innocence of the defendants, then such discrepancy or disputed points are immaterial and minor matters, and you should waste no further time in discussing or considering them.

There was more than one "*true issue in this case.*" There were many true issues. And no discrepancy in the evidence *affected* the guilt or innocence of the defendants. And no discrepancy or disputed point was *material to establish* the guilt or innocence of the defendants. And there was no one "main or material issue of fact." There were many main and material issues of fact. And the decision of no single discrepancy in the evidence and of no single disputed point was "*necessary*" to enable the jury to arrive at the guilt or innocence of the defendants. Only by considering and resolving all or at least most of the dis-

crepancies or disputed points in the record could the jury arrive at a fair conclusion concerning the guilt or innocence of the defendants.

This instruction in practical effect told the jury to ignore all of the discrepancies in the testimony of the witnesses for the prosecution and to consider only so much of the testimony of such witnesses as pointed to the guilt or innocence of the defendants, even where parts of that testimony was inconsistent or in conflict with other testimony given by the same witness. As the testimony of such witnesses which remained after those discrepancies were cast aside either pointed to the guilt of the defendants or pointed neither toward the guilt nor the innocence of the defendants, this instruction in practical effect told the jury to consider only so much of the testimony of the witnesses for the prosecution as pointed in the direction of the guilt of the defendants and to ignore as immaterial all discrepancies which indicated that the witnesses for the prosecution were not credible witnesses.

This instruction in practical effect told the jury to ignore all conflicts in the evidence where it was not *necessary* to decide those conflicts one way or another to determine the question of the guilt or innocence of the defendants. As to the extent that such conflicts bore upon the question of the credibility of witnesses as distinguished from whether the allegations in the indictment were or were not true, this instruction told the jury to ignore as immaterial such conflicts in the evidence. Thus, all of the "Stockton witnesses"

produced by the defendants to establish that the testimony of the prosecution witnesses Crouch and Johnson relating to the presence of the defendant Bridges in New York City at a particular time was false in that the defendant Bridges was in the City of Stockton, California, at such time, was under this instruction to be disregarded as immaterial because the presence of Harry Bridges in the City of Stockton at the time in question would not prove or disprove the innocence or guilt of the defendants of the offenses charged against them in the indictment. Thus also under this instruction the testimony of all of the character witnesses produced by the defendants was to be disregarded as immaterial for the reason that a showing that the defendants were persons of good character would not either prove or disprove their guilt or innocence.

The effect of this instruction was to emasculate, to reduce to a shadow the case put on by the defendants, both by the introduction of testimony and other evidence, and by the development in cross-examination of discrepancies in the testimony of witnesses for the prosecution, including admissions by many of those witnesses that they had on previous occasions given false testimony under oath concerning the very things about which they were testifying to establish a case against the defendants. It even, in effect, told the jury to ignore the fact that the prosecution witness Ross admitted while on the witness stand that he had while testifying on direct examination given false

testimony concerning his name, parentage, place of birth, places of residence, occupations, and the like.

That such was the intended purpose of this instruction is made indisputably clear by the following statement made by the trial Court at the outset of his charge to the jury, namely:

“I trust that you may be able to perceive the truth shimmering like gold in the crucibles of this trial, in the searching light of legal principles applicable.” (R. 7864.)

and the corresponding statement by the trial Court following the return of the verdicts of guilty in congratulating the jury on those verdicts, viz.,

“You have finally found the golden truth shimmering in the fiery crucibles of this trial.” (R. 8038.)

In other words, in giving this instruction the trial Court told the jury that everything in the record, all discrepancies, all conflicts, which pointed away from the guilt of the defendants was dross, and that all that pointed in the direction of their guilt was pure gold.

IV. INSTRUCTIONS RE CONSPIRACY.

The trial Court committed prejudicial error in giving to the jury the prosecution's proposed instructions numbered 5 and 8. (Tr. 322-324, 7899 and 7900-1) set

out in Specification of Errors 13 (o) and (p), *supra*, pages 27-29.

To each of these instructions as proposed by the prosecution was appended a misleading citation. To proposed Instruction No. 5, the citation read as follows: “(United States v. Potash, et al., District Court for Southern District New York; affirmed as to four defendants, United States v. Potash, 118 F. (2d) 42 (C.C.A. 2); cert. den. United States v. Potash, 313 U.S. 584)”. The cited decision does not contain any indication that such an instruction was given. The only question raised as to the charge of the Court was that an instruction that certain persons were co-conspirators was not given. The briefs in that case disclose that no point was made of the giving of the instruction proposed by the prosecution in this case.

Appended to Instruction No. 8 as proposed was this citation: “(United States v. Braverman, et al., U. S. District Court for Eastern District of Michigan; aff. 125 F. (2d) 283; reversed on other grounds, viz., for re-sentencing of defendants, 317 U.S. 49)”. The cited decision does not directly support the statements made in the proposed instruction, and no instruction as proposed was reviewed in the recorded decision. This instruction was in fact given in that case (see the record in that case at pp. 642-3), but following a long and explicit instruction which rendered it harmless (see record in that case at pp. 623-643). Furthermore, the “common design” in that case, if there was a “common design”, had to be illegal.

The prosecution's proposed instruction No. 5 was prejudicially erroneous in that it discussed the matter of probabilities, and what persons usually do, and what conspirators rarely do. It in effect told the jury that they could convict the defendants of the conspiracy charged in the first count of the indictment on the basis of probabilities. The vice of the prosecution's proposed Instruction No. 8 consists in the opening sentence, viz., "I think I should further charge you that all persons working together in the furtherance of a common design are members of the conspiracy, although the part any one is to take is subordinate or is to be executed at a remote distance." This in practical effect told the jury that if the three defendants had a common design to obtain the naturalization of the defendant Bridges, they were guilty of the conspiracy charged in the first count of the indictment. It did not, however, tell them that in order to convict, the common design had to be to procure that naturalization by fraudulent means or by the giving of false testimony.

V. THE TRIAL COURT ERRED IN GIVING OF ITS OWN VOLITION THE FOLLOWING INSTRUCTION SET OUT IN SPECIFICATION OF ERROR 13(a), SUPRA, p. 19.

(a) In the issue of Mr. Bridges' asserted membership in the Communist Party, eleven witnesses have testified for the government: Messrs. Schomaker, Schrimpf, Hancock, Mrs. Harris, Mr. Krolek, Johnson, Crouch, Ross, Michener, Wil-

son and Rathborne. As opposed to the foregoing witnesses concerning the alleged membership in the Communist Party, Mr. Bridges, as well as the other defendants, the defendants have offered two witnesses other than themselves, that is, Bruce B. Jones and Mrs. Jean Murray. These, apart from the character witnesses offered by the defense. (Tr. 7864-7865.)

In this instruction Judge Harris adopted in substance the following argument made by the chief prosecutor in the prosecution's closing argument to the jury:

"I asked you this question at that time: Who said Harry Bridges was a member of the Communist Party? And I called off the roll: John Schomaker, Henry Schrimpf, Mrs. Irene Harris, Stanley Hancock, Charles Krolek, Paul Crouch, Manning Johnson, Lawrence Ross, Lewis Michener, Mervyn Rathborne and George Wilson.

And I asked you at that time: Who, on the other hand, has told you that Mr. Bridges was not a member of the Communist Party, who could have been in a position to know? And I call the roll as: Bruce B. Jones, Jean Murray and Harry Bridges.

Now, let me ask you the question: Who said Henry Schmidt was a member of the Communist Party? John Schomaker, Henry Schrimpf, Stanley Hancock, Mervyn Rathborne and George Wilson. And who said Henry Schmidt was not a member of the Communist Party? Henry Schmidt.

Who said J. R. Robertson was a member of the Communist Party? Mervyn Rathborne and

George Wilson. And who said J. R. Robertson was not a member of the Communist Party? J. R. Robertson." (Tr. 7843-4.)

By adopting that argument, Judge Harris himself made that argument and accentuated it.

The vice of such instruction is two-fold: First, because it conveyed to the jury the thought that they should decide the question of the guilt or innocence of the three defendants on the basis of the number of witnesses who gave testimony pertaining to whether the appellants were or were not members of the Communist Party. The second vice in this instruction is that although giving slight, and slighting, reference to the character witnesses offered by the defense, it completely ignored the fact that ten witnesses testified and produced documentary evidence in contradiction of the testimony given by the prosecution's witnesses Crouch and Johnson concerning the presence of appellant Bridges at the National Convention of the Communist Party in New York on June 26-27, 1936, by which testimony of Crouch and Johnson the prosecution attempted to establish that appellant Bridges, under the name of Harry Dorgan, was elected to high office in the Communist Party of the United States. Those witnesses were Walter W. Mahaffey, Mike Silk, Gerald McDonald, Louie Devonshire, James Shuffler, Frank J. Jaworski, Barth Woods, Kirk Clagstone, William Christianson, Aubrey F. Lee and John Sawyer.

Two of those witnesses, namely, Aubrey Lee and Kirk Clagstone, were complete strangers to appel-

lants. Aubrey Lee was married in Stockton, California, on June 27, 1936, and he testified concerning his marriage and the wedding party. Mr. Clagstone was an usher at that wedding and with other members of the wedding party attended a nightclub in the City of Stockton on the evening of June 27, 1936, at which Bridges and other members of Bridges' party were present.

Thus in this instruction by failing to mention the Stockton witnesses in relation to the issue of whether Bridges was or was not a member of the Communist Party, the trial judge told the jury to ignore the testimony given and the evidence produced by the witnesses in contradiction of the very damaging testimony given by the prosecution witnesses Crouch and Johnson, which were specially mentioned in this instruction.

VI. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING THE INSTRUCTION SET FORTH UNDER SPECIFICATION OF ERROR 13(c), SUPRA, pp. 20-21. (Tr. 7868.)

In effect it told the jury to give no consideration to the Supreme Court decision in the case of *Bridges v. Wixon* in relation to the testimony of appellants Schmidt and Robertson that they base their opinion that appellant Bridges was not a member and had not been a member of the Communist Party in part upon that decision.

VII. THE TRIAL COURT ERRED IN GIVING INSTRUCTIONS SET FORTH IN SPECIFICATION OF ERROR 13(i) AND (m), SUPRA, pp. 24 and 26-27. (Tr. 7880-1 and 7914.)

These instructions were error in that they materially misstated the elements of the offense charged against appellants Schmidt and Robertson in the third count of the indictment.

VIII. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING THE INSTRUCTION SET FORTH UNDER SPECIFICATION OF ERROR 13(k), SUPRA, pp. 25-26. (Tr. 7887.)

It told the jury that the "crucial question" as to whether appellants Schmidt and Robertson were guilty of the offenses charged against them was whether they had any intent to deceive and defraud the Government of the United States and that the "asserted good faith, the intent, the purpose, and the motive" of the defendants Schmidt and Robertson "constituted *the* vital and important element of the case brought against them.", ignoring completely the fact that to be guilty of either of the offenses charged against them, they, in addition to having an intent to deceive or defraud the Government, and in addition to having not had good faith, etc., would have had to have done the things which they were charged with having done in counts 1 and 3 of the indictment. In other words, this instruction in effect told the jury that if appellants Schmidt and Robertson had a wrongful intent, they should be convicted of conspiracy even though they did not conspire, and that

if they had a wrongful intent they should be convicted of having aided and abetted appellant Bridges in obtaining naturalization even though they did nothing to encourage or aid the defendant Bridges to apply for, receive or obtain a certificate of naturalization.

IX. THE TRIAL COURT ERRED IN GIVING THE INSTRUCTION SET FORTH IN SPECIFICATION OF ERROR 13(1), SUPRA, p. 26. (Tr. 7895.)

Such an instruction is contrary to the decision of this Court in the case of *Luse v. United States*, 49 F.2d 241 (9 Cir., 1931).

POINT XI.

THE TRIAL COURT ERRED IN ITS ORDER REVOKING APPELLANT BRIDGES' NATURALIZATION.

(Specification of Error 21.)

I. PRELIMINARY.

After the conviction of appellant Bridges and after he had filed his notice of appeal, the Government moved the trial Court for an order revoking his citizenship. The trial Court made such an order (Tr. 8-12 of 12607) relying upon the provisions of 8 U.S.C.A. 738(e). The appeal from that order is now before this Court (Tr. 7-8, 12-13 of 12607) along with the appeal from the judgments of conviction.

Obviously upon a reversal of the judgments of conviction, the order revoking citizenship will have to fall.

However, since such an order has been filed with the clerk of the Court below, the mandate of this Court should direct a reversal of the order revoking citizenship as well. In addition to the fact that the order of revocation must fall because the conviction cannot stand for the reasons heretofore discussed in this brief, there are several independent considerations which demonstrate that the order of revocation is invalid. We consider these briefly.

Section 738(e) of Title 8 provides for revocation of the naturalization of a person who "shall be convicted under this chapter of knowingly procuring naturalization in violation of law". Subsection (e) is preceded by subsections (a) to (d), which provide a method for denaturalization without reference to criminal convictions. Such civil denaturalization proceedings may be brought by the Government upon the ground of fraud or illegal procurement of naturalization.

Thus the statutory scheme provides two methods for revoking citizenship: one, in an independent civil action; and the other, as ancillary to a criminal proceeding.

In determining the extent of the Court's power to proceed under Subsection (e), consideration must be given to the cases having to do with the Court's power under Subsections (a) to (d) since the two methods of procedure are so closely related, and since no case under Subsection (e) has, to our knowledge, reached an Appellate Court. These cases, furthermore, set a

background against which the action of the trial Court here under consideration may be judged.

In *Schneiderman v. United States*, 320 U.S. 118 (1943), the Government sought to cancel the defendant's naturalization upon the ground that he had illegally obtained citizenship. The illegality was alleged to consist of the fact that at the time of his naturalization he had not been attached to the principles of the Constitution. Despite the fact that the trial Court and this Court both sustained the Government, and in the face of the rule that the Supreme Court gives considerable weight to this Court's affirmation of a trial Court finding, the Supreme Court re-examined the record for itself and reversed the judgment below. This it did primarily because of the fundamental nature of the rights involved and out of a desire to make explicit the standard which had to be met before those rights could be abrogated.

“This is not a naturalization proceeding in which the Government is being asked to confer the privilege of citizenship upon an applicant. Instead the Government seeks to turn the clock back twelve years after full citizenship was conferred upon petitioner by a judicial decree, and to deprive him of the priceless benefits that derive from that status. In its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded

as the highest hope of civilized man.” (*Ibid.*, 320 U.S. at 122.)

This doctrine was reapplied, and the *Schneiderman* case was relied on, in *Baumgartner v. United States*, 322 U.S. 665 (1944), where the Supreme Court unanimously again reversed the findings of both the District Court and the Court of Appeals after its own independent examination of the record and its own evaluation of the evidence.

In *Knauer v. United States*, 328 U.S. 654 (1946), the Court said:

“Citizenship obtained through naturalization is not a second class citizenship. It has been said that citizenship carries with it all of the rights and prerogatives of citizenship obtained by birth in this country ‘save that of eligibility to the Presidency.’ ” (*Ibid.*, 328 U.S. at 658.)

In addition to the fact that the rights here involved are of paramount importance, is the fact that these rights are imbedded in a judicial decree and that revocation is in effect a nullification of a valid subsisting decree. In the *Schneiderman* case, *supra*, the Court said:

“We are dealing here with a court decree entered after an opportunity to be heard. At the time petitioner secured his certificate of citizenship from the federal district court for the Southern District of California notice of the filing of the naturalization petition was required to be given ninety days before the petition was acted on (§6 of the Act of 1906), the hearing on the petition

was to take place in open court (§9), and the *United States had the right to appear, to cross-examine petitioner and his witnesses, to introduce evidence, and to oppose the petition* (§11). In acting upon the petition the district court exercised the judicial power conferred by Article III of the Constitution, and *the Government had the right to appeal from the decision granting naturalization.*" (*Ibid.*, 320 U.S. at 123.)

In the Bridges naturalization proceedings, Judge Foley also exercised his judicial power and the Government not only had the rights adverted to above, but exercised most of them; since it did not avail itself of its right to appeal from the order admitting to citizenship, that order had long since become final.

Because of the nature of the rights involved in a grant of citizenship and the solemnity and dignity which attach to the decree of naturalization, the Supreme Court has held that the rights cannot be destroyed or the decree voided except by meeting a most rigid standard of proof. In both the *Schneiderman* and *Baumgartner* cases, *supra*, it took the extraordinary step of reversing a Circuit Court's affirmance of a District Court decree in favor of the Government, because it was not satisfied with the evidence offered—a matter usually regarded as within the discretion of the trial Court.

It did this because, as it said in the *Schneiderman* case:

"* * * rights once conferred should not be lightly revoked. And more especially is this true when

the rights are precious and when they are conferred by solemn adjudication, as is the situation when citizenship is granted.” (*Ibid.*, 320 U.S. at 125.)

A last case to be considered here establishes that rigid procedural requirements must be met before citizenship can be revoked.

In *Klapprott v. United States*, 335 U.S. 601 (1949), after the statutory time to answer had expired, the default of the defendant was entered and his naturalization revoked. The defendant subsequently moved to set aside the default. The trial Court dismissed his petition and the Circuit Court affirmed its order. The Supreme Court reversed both lower tribunals and ordered the default set aside.

“Denaturalization consequences may be more grave than consequences that flow from conviction for crimes. Persons charged with crime in United States courts cannot be convicted on default judgments unsupported by proof. Even decrees of divorce or default judgments for money damages where there is any uncertainty as to the amount must ordinarily be supported by actual proof. The reasons for requirement of proof in cases involving money apply with much greater force to cases which involve forfeiture of citizenship and subsequent deportation. This Court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty. The consequences of such a deprivation may even rest heavily upon his children. 8 U.S.C. §719, 8 U.S.C.A. §719. As

a result of the denaturalization here, petitioner has been ordered deported. 'To deport one who so claims to be a citizen obviously deprives him of liberty * * *. It may result also in loss of both property and life, or of all that makes life worth living.' *Ng Fung Ho v. White*, 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938. Because denaturalization proceedings have not fallen within the technical classification of crimes is hardly a satisfactory reason for allowing denaturalization without proof while requiring proof to support a mere money fine or a short imprisonment.

*"Furthermore, because of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt * * * it is our opinion that courts should not in §738 proceedings deprive a person of his citizenship until the Government first offers proof of its charges sufficient to satisfy the burden imposed on it, even in cases where the defendant has made default in appearance."* (*Ibid.*, 335 U.S. at 611-615.)

Justices Murphy and Rutledge joined in the opinion of the majority of the Court and furthermore said:

"To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others. To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to

our law and at most but doubtfully within Congress' power. U.S. Const. Amend. VIII." (*Ibid.*, 335 U.S. at 616-617.)

From all of the foregoing, the following emerges:

(a) The naturalized citizen obtains as a result of his naturalization exactly the same rights, benefits, privileges and immunities as a native-born citizen has (with the exception of his eligibility to the Presidency)—rights subject to the most careful protection by the Court.

(b) Naturalization, which confers such rights, benefits, privileges and immunities upon an alien, is a solemn judicial act of a competent tribunal and entitled to all the respect usually accorded to such acts.

(c) In the case at bar the Government had the right to oppose or to appeal from the decree granting citizenship to Bridges and its failure to do so rendered the judgment of the Superior Court a final and conclusive adjudication of the citizenship rights of Bridges.

(d) The rights which Bridges thus acquired and the solemn judgment which gave him those rights cannot be destroyed by the Government except by clear, convincing and overwhelming proof; they cannot be destroyed by default and any effort to destroy them must be scrutinized by this Court with the greatest of care.

It is true that the foregoing cases are civil denaturalization proceedings but it does not follow that

the conclusions drawn have no application to the case at bar. On the contrary, the language of the Court in these various opinions makes it clear that it is speaking generally of the nature of the rights granted by a decree of naturalization and that it is concerned with the effort to revoke, cancel or destroy those rights and to set aside such a solemn decree, irrespective of the particular form which that effort takes. We submit that the same criteria apply in the present case despite the fact that the trial Court presumably acted under Subsection (e) of 8 U.S.C.A. 738 rather than under Subsections (a) to (d) of that section.

**II. 8 U.S.C.A. 738(e) HAS NO APPLICATION
TO THIS CASE.**

The trial Court, in what amounted to an *ex parte* proceeding, without affording Bridges an opportunity to present any testimony on the issue and without itself adducing any evidence upon which any finding could be based, set aside and cancelled the judicial decree of a California Court granting basic citizenship rights to Bridges.

It did this upon the basis of 8 U.S.C.A. 738(e), which reads as follows:

“When a person shall be convicted under this chapter of knowingly procuring naturalization in violation of law, the court in which such conviction it had shall thereupon revoke, set aside, and declare void the final order admitting such per-

son to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication."

The difficulty with the Court's order is that the case before it did not fall within the provisions of §738(e). In order to satisfy §738(e) there must be at least three conditions met:

- (a) The person must have been "convicted".
- (b) He must have been convicted "under this chapter".
- (c) He must have been convicted thereunder of "knowingly procuring naturalization in violation of law".

Not a single one of these requirements was met in this case. Since the statute requires that all three be met, the failure to meet *any one*, particularly in the light of the preliminary observations made above, requires a reversal of the order here under consideration.

1. **There had been no "conviction" at the time the order of revocation was entered.**

Whatever may be the popular conception of the meaning of the word "conviction", in its legal significance it means a final, binding and conclusive judgment. (13 C. J. 909, 16 C. J. 1267.) Until the judgment is final, there is no conviction.

In *Dial v. Commonwealth*, 142 Ky. 32 (1911) (involving the competency of a witness), the Court said:

“The word ‘conviction’ has a twofold meaning. One is the determination of the fact of guilt, as by the verdict of a jury * * * or by confession * * * The other, and the one in which it is employed in speaking of a state of infamy, denotes the *final* judgment in the prosecution.” (*Ibid.*, 142 Ky. at 33-34.)

In *Commonwealth v. Kiley*, 150 Mass. 325 (1889) (involving the forfeiture of a liquor license), the Court said:

“Nothing less than a *final* judgment conclusively establishing guilt will satisfy the meaning of the word ‘conviction’ as here used.” (*Ibid.*, 150 Mass. at 326.)

To the same effect see *Thompson v. United States*, 30 App. D.C. 352 (1908) (credibility of a witness); *Commonwealth v. McDermott*, 224 Pa. 363 (1909) (prior conviction statute); *People v. Fabian*, 192 N.Y. 443 (1908) (disenfranchisement after “conviction”); *People v. Schaller*, 224 App. Div. 3 (1928) (prior conviction statute); *State v. Savage*, 86 W. Va. 655 (1920) (same).

Thus wherever the status or rights of an individual are at stake and it is sought to destroy that status or deprive him of those rights, the Courts have insisted upon *finality of judgment* as a condition precedent to such action. This must be particularly so in a case where the status and rights involved have been de-

clared by the Supreme Court to enjoy the highest kind of protection and where they have been established by a final decree of a Court of competent jurisdiction.

There was here no *final* judgment since the entire question of guilt or innocence was still at large because of the pendency of the appeal from the "conviction". It has been universally held that the pendency of an appeal deprives the judgment of the finality necessary as a condition precedent before disabilities such as are here involved—or even disabilities of a lesser nature—can attach.

In *Staniforth v. State*, 24 Ohio App. 208 (1927), the question was whether there could be a trial under a "second offense statute" while proceedings with respect to the first offense were pending and undecided before an Appellate Court. The defendant had been charged, tried and found guilty; and judgment had been entered. *The defendant was in the course of prosecuting an appeal from that judgment when he committed the second offense.* The Ohio Court held that there had not been a prior "conviction", saying:

"* * * it is our judgment that before one can be charged with a second offense the first proceeding must have resulted *finally* in sustaining the conviction, as otherwise a discharge acquitting the defendant would wipe out the legal character of the charge known as the first offense, and consequently under such legal status, there could be no second offense * * * A logical analysis of the question raised forces but one conclusion, which is that there must be a *final* adjudication of the

first offense before it can be decided that there is a second offense * * *” (*Ibid.*, 24 Ohio App. at 209-210.)

The Court emphasized that when a “conviction” is made the ground of *some disability or special penalty over and above that normally imposed for the commission of the crime*, there must of necessity be a “final adjudication” and such a situation arises only when “the judgment thereon [has] become final.”

In *Arbuckle v. State*, 132 Tex. Crim. Rep. 371 (1937), the same problem was presented and the same conclusion was reached, the Court saying:

“Before a prior conviction may be relied on to enhance the punishment in a subsequent case such prior conviction must be *final*. If an appeal has been taken from a judgment of guilty in the trial court that conviction does not become final until the judgment of the lower court has been affirmed by the appellate court. It is not necessary to discuss at length the two foregoing propositions or to cite authorities to support them. *They are too well established* by our own decisions, as well as those from other jurisdictions, to consume time or space further than to state them, and they will be referred to later only incidentally.” (*Ibid.*, 132 Tex. Crim. Rep. at 372-3.)

In *Joyner v. State*, 158 Fla. 806 (1947), the same conclusion was reached upon a record which showed that the judgment of conviction for the alleged first offense was pending on appeal at the time the alleged second offense was committed.

“It appears very well settled that before a prior conviction may be relied upon to enhance the punishment in a subsequent case such prior conviction must be *final*. If an appeal has been taken from a judgment of guilty in the trial court *that conviction does not become final* until the judgment of the lower court has been affirmed by the appellate court.” (*Ibid.*, 158 Fla. at 808.)

In the cases just discussed, there was involved the imposition of an added penalty—usually a longer prison term—because of the alleged existence of a prior “conviction”. Certainly if in cases of that character the Courts insist upon an appellate affirmance before attaching to the prior conviction the finality required by law, this Court can do no less in the case at bar.

Apart from the provisions of 8 U.S.C.A. 738(e), the penalty to which Bridges was liable as a result of his “conviction” is fixed by the Criminal Code of the United States and had already been imposed by the trial Court. Based upon 8 U.S.C.A. 738(e) the Government sought and the Court imposed an *added penalty* which is not found in the Criminal Code. It was a penalty which could seriously affect Bridges’ citizenship rights and status pending his appeal and which would vacate a solemn judicial decree made by a Court of coordinate jurisdiction. The Supreme Court of the United States has pointed out the safeguards which surround a defendant in such a situation, and certainly they are greater than those which protect against liability for merely added punish-

ment. Certainly if "conviction" in the cases just considered means a final, post-appellate adjudication, it can mean no less here.

To conclude this phase of the matter we quote from *Mariano v. Judge of District Court*, 243 Mass. 90 (1922), where the Court said:

"Conviction ordinarily means a conclusive establishment of guilt. It imports that the question of guilt has been adjudicated and *is not open to further inquiry as of right* by the person convicted." (*Ibid.*, 243 Mass. at 92.)

And from *In re Phillips*, 17 Cal.2d 55 (1941), where the Court said:

"An order granting a new trial or *a reversal of the judgment of conviction* is based upon the premise that error was committed which renders it uncertain whether the defendant is actually guilty of the crime of which he was convicted. (See 8 Cal. Jur. 414, 489.) *So long as such action can be taken, it is clear that the judgment of conviction is not final* because it is still possible that an ultimate determination on the merits will find the defendant not guilty." (*Ibid.*, 17 Cal.2d at 60.)¹

Here, of course, the question of guilt had not been so finally adjudicated where the trial Court made its order of revocation—and has not yet been so adjudicated. Under the federal statutes the question of guilt *was open to further inquiry as of right* by *Bridges*;

¹To the same effect see the cases collected in 113 A.L.R. 1181.

and as the records of this Court show, he availed himself of that right by prosecuting an appeal from the judgment of the trial Court. Consequently it cannot be said that he had been "convicted" in the sense in which that term must be understood as used in 8 U.S.C.A. 738(e).

2. **There was no conviction under the chapter referred to in 8 U.S.C.A. 738(e).**

Bridges was not convicted under any law contained in "this chapter" as required by 8 U.S.C.A. 738(e). "This chapter" clearly refers to Chapter 11 of Title 8. That is the chapter in which 738(e) is to be found.

Bridges was tried under two counts of an indictment:

The first count was a general conspiracy count and was based upon a section in the *old Title 18* which was later carried over into the *new Title 18*. Clearly a conviction on that count was not a conviction under Chapter 11, or *any chapter*, of *Title 8*.

The second count of the indictment under which Bridges was convicted *is laid not under any section of Chapter 11 of Title 8* but according to the Government's designation in the indictment is laid under a section of the *new Title 18*, to-wit, § 1015(1). This section, according to the Government's caption of the second count of the indictment, derives from § 746(1). However, at the time the indictment was returned on May 25, 1949, and at the time the judgment of conviction was entered on April 10, 1950, § 746(a)(1) of

Title 8 had long since been repealed.² Thus when § 738(e) speaks of the conviction of a crime “under this chapter” as a prerequisite for the order appealed from here, and when the section “under this chapter” upon which the indictment was based, had been repealed effective nine months prior to the return of the indictment and almost two years prior to the trial Court’s judgment, it is clear that there was no conviction “*under this chapter*”.

It is true that at the time of the repeal of the penal provisions of § 746 of Title 8, many of them were re-enacted into the new Criminal Code (*Title 18*) at various points. However, certainly such a repeal and re-enactment removed them from being “under this chapter” as required by § 738(e). It is preposterous to say that a conviction under a section of *Title 18* of the United States Code is equivalent to a conviction under a chapter of *Title 8* of the United States Code.

3. Bridges was not convicted of “knowingly” procuring naturalization in violation of law.

The third requirement of § 738(e) has not been met. § 738(e) is a very carefully drafted statute. It does *not* provide that upon conviction for *any* violation of the Nationality Code the citizenship of a naturalized citizen may be revoked.³ On the contrary,

²Act of June 25, 1948, Chap. 645, §21, 62 Stat. 692, effective September 1, 1948.

³It may be arguable that the broader language of Subsections (a) to (d) of §738 have this effect. However that, too, is doubtful in view of the *Schneiderman*, *Baumgartner*, *Knauer* and *Klapprott* cases, *supra*. In any case, that problem is not now before the Court.

it provides that such revocation shall occur only upon conviction for "knowingly procuring naturalization in violation of law." The quoted words are clearly words of limitation and, bearing in mind the standards established in the denaturalization cases, those words must be liberally applied in favor of the naturalized citizen. If the Congress had intended to authorize revocation of citizenship for *any* violation of the nationality laws, it would not have had occasion to insert these words of limitation in § 738(e), and § 738(e) could readily have read: "When a person shall be convicted under this chapter, the court in which such conviction is had shall thereupon revoke, etc." But the Congress limited the power to revoke citizenship to a conviction for "knowingly procuring naturalization in violation of law."

Bridges was not convicted of knowingly procuring naturalization in violation of law, he was not even charged with such an offense. He was charged in the first count with conspiracy, which is admittedly a separate and distinct offense from the substantive offense charged and which, as we have pointed out, arises and always arose under *Title 18*, the general criminal law, and never arose under any section of any chapter of *Title 8*; and he was charged in the second count with *false swearing in a naturalization proceeding*. The charge in the second count and the guilt or innocence of Bridges on that count *in no wise depended upon the fact of his procuring naturalization*.

It is clear that the offense to which § 738(e) refers and the offense involved here are two separate and distinct offenses. The first one, that of knowingly procuring citizenship in violation of law, is now to be found in 18 U.S.C.A. 1425. The second one, that of false swearing in a naturalization proceeding, is now to be found in 18 U.S.C.A. 1015(a).

The offense of *knowingly procuring naturalization in violation of law* is found in Chapter 69 of Title 18, a chapter dealing exclusively with matters relating to nationality and citizenship. The offense of *false swearing in a naturalization proceeding* is found in Chapter 47 of Title 18, a chapter dealing generally with false swearing and fraudulent statements and not specifically with naturalization or nationality matters. It is clear that the offense of which 8 U.S.C.A. 738(e) speaks and the offense involved in the second count of the Bridges indictment are *two separate and distinct offenses* and are found in two separate and distinct sections of the present Criminal Code—a code which was in effect during all stages of the proceeding below.

Not only are these two sections separate and distinct sections of the present Criminal Code at the present time, but throughout their entire history they have been separate and distinct, and the added punishment of automatic revocation of citizenship has always applied *only to the offense of knowingly procuring naturalization in violation of law* and not to the *separate and distinct offense of false swearing in a natur-*

alization proceeding. This was true even when the two sections were part of the same nationality code or the same nationality statute.

These offenses first appear in the *Naturalization Act of March 3, 1903* (57th Congress, 2d Session, Chapter 1012) (32 Stat. 1213). § 39 of that Act (32 Stat. 1222) provided as follows:

First:

“Any person who procures naturalization in violation of the provisions of this section shall be fined * * * and imprisoned * * * *and* the court in which such conviction is had shall thereupon adjudge and declare the order or decree and all certificates admitting such person to citizenship null and void.”

Second:

“Any person who * * * in any naturalization proceeding procures or gives false testimony as to any material fact shall be fined * * * and imprisoned * * *”

Thus in the 1903 statute Congress imposed the added penalty of revocation of citizenship only when a person is found guilty of procuring naturalization in violation of law. *It did not impose that penalty where a person was found guilty of false swearing.*

This distinction was retained in the *Act of June 29, 1906* (59th Congress, Chap. 3592) (34 Stat. 596), an *Act to Provide for a Uniform Rule for the Naturalization of Aliens throughout the United States*. § 23 of that Act (34 Stat. 603) provided as follows:

First:

“* * * Any person who knowingly procures naturalization in violation of the provisions of this Act shall be fined * * * and imprisoned * * * and upon conviction the court in which said conviction is had shall thereupon adjudge and declare the final order admitting such person to citizenship void.”

Second:

“* * * Any person who in any naturalization proceeding knowingly procures or gives false testimony as to any material fact shall be fined * * * and imprisoned * * *”

Here again the penalty of revocation of citizenship, over and above the penalty of fine and imprisonment, was imposed only in cases where a conviction was had for knowingly procuring citizenship in violation of law. *It was not imposed for the offense of knowingly giving false testimony.*

This distinction was carried into the *Nationality Code of 1940*, 8 U.S.C.A. 746, where the two crimes we are considering appear as *separate and distinct* subsections of Subsection (a). Subsection (a) of 8 U.S.C.A. 746 reads as follows:

“It is hereby made a felony for any * * * person * * *”

First:

“(1) knowingly to make a false statement under oath * * * in any case * * * relating to * * * naturalization or citizenship; * * *”

Second:

“(2) knowingly to procure * * * the naturalization of any * * * person, contrary to the provisions of any law.”

So again we see that the two offenses we have been considering are separate and distinct, and it is clear from a reading of § 738(e) that the trial Court's authority to revoke that citizenship is limited to convictions for “knowingly procuring naturalization in violation of law” and that it had no authority automatically to revoke citizenship in the event of a “conviction” for “false swearing”.

CONCLUSION.

For all of the foregoing reasons together, and for each one of them taken independently, the judgments of conviction and order of revocation cannot stand. The judgments appealed from should and must be reversed.

Dated, San Francisco, California,

July 16, 1951.

Respectfully submitted,

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(Appendix Follows.)

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The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of life, and shows that the most plausible is the theory of spontaneous generation. This theory is based on the fact that life is a complex of many different parts, and that these parts are all derived from a common ancestor. The author also discusses the possibility of life being created by a divine power, and shows that this is a very unlikely possibility. The author concludes that the most plausible theory of the origin of life is the theory of spontaneous generation.

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Appendix.



Appendix

House of Representatives Report No. 2051
77th Congress, 2d Session

SUSPENDING STATUTE OF LIMITATIONS FOR FRAUDS AGAINST THE UNITED STATES

April 27, 1942.—Referred to the House Calendar and
ordered to be printed.

Mr. McLaughlin, from the Committee on the Judiciary, submitted the following

REPORT

(To accompany H. R. 6484)

The Committee on the Judiciary, to whom was referred the bill (H. R. 6484) to suspend during the present war the running of statutes of limitations applicable to certain offenses, after careful consideration, report the bill favorably to the House with the recommendation that it do pass.

The purpose of the proposed legislation is to suspend any existing statute of limitation applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, for the period of the present war. Contracting for the United States is done through its various agencies, including the departments and independent establishments and Government-owned and Government-con-

trolled corporations, and frauds against all of these agencies are intended to be embraced by the bill.

During the World War many frauds committed against the Government were not discovered until the 3-year statute of limitations had almost expired, and as stated in the committee report hereinafter referred to, many of the alleged offenses were barred from prosecution. The general criminal statute of limitations (Rev. Stats., sec. 1044) was amended on November 17, 1921, extending the period to 6 years in respect to offenses involving frauds against the United States (42 Stat. 220, U. S. C., title 18, sec. 582). This provision was repealed by the act of December 27, 1927 (45 Stat. 51).

In connection with the World War legislation of this character the committee report (H. Rept. 365, 67th Cong.) stated the following:

The Department of Justice has been engaged in the investigation and is now engaged in the investigation of various alleged offenses, consisting largely of frauds against the Government which are claimed to have occurred during the war with Germany and since its conclusion. Many of these alleged offenses grew out of the contractual relation of the Government with various persons and corporations engaged in the furnishing of military and naval supplies of various kinds. Many of these transactions require the most minute investigation in order to ascertain the exact facts, and in every case a considerable period must elapse before such facts may be gathered from the files and other sources that the

Department may know whether prosecutions are justified or not. In many cases months, and perhaps considerable longer periods, will be required for such investigations.

Under the existing statute of limitations, above quoted, many of these alleged crimes are already barred, and in all such cases under the law no prosecutions can be had if any might be thought advisable. * * *

During normal times the present 3-year statute of limitations may afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute frauds against the Government. The United States, however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and to prosecute frauds against the Government, it is recognized that in the varied dealings opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law-enforcement branch of the Government is also busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws.

Your committee is of the opinion that action should be taken at this time to extend the limitations statute

so that frauds may be discovered and punished even after the termination of the present conflict, and to insure that the limitations statute will not operate, under the stress of present-day events, for the protection of those who would defraud or attempt to defraud the United States.

The proposed measure has been cleared with the Legislative Committee of the Department of Justice and with the Bureau of the Budget.

Calender No. 1593

Senate Report No. 1544, 77th Congress, 2d Session

SUSPENDING DURING THE PRESENT WAR THE RUNNING OF
THE STATUTE OF LIMITATIONS APPLICABLE TO CERTAIN
OFFENSES.

July 13, 1942.—Ordered to be printed.

Mr. Burton, from the Committee on the Judiciary, submitted the following

REPORT

(To accompany H. R. 6484)

The Committee on the Judiciary, to whom was referred the bill (H. R. 6484) to suspend during the present war the running of the statutes of limitations applicable to certain offenses, having considered the same, report the bill favorably to the Senate, with an

amendment, with the recommendation that the bill, as amended, do pass. The amendment follows:

Page 1 line 7, strike out all after the word "suspended", and in line 8, strike out the following: "of the present war and for six months thereafter.", and insert in lieu thereof, "until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate."

The purpose of the proposed legislation is to suspend any existing statutes of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, for the period of the present war. Contracting for the United States is done through its various agencies, including the departments and independent establishments and Government-owned and Government-controlled corporations, and frauds against all of these agencies are intended to be embraced by the bill.

During the World War many frauds committed against the Government were not discovered until the 3-year statute of limitations had almost expired, and as stated in the committee report hereinafter referred to, many of the alleged offenses were barred from prosecution. The general criminal statute of limitations (Rev. Stats., sec. 1044) was amended on November 17, 1921, extending the period to 6 years in respect to offenses involving frauds against the United States (42 Stat. 220, U. S. C., title 18, sec. 582). This provision was repealed by the act of December 27, 1927 (45 Stat. 51).

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During normal times the present 3-year statute of limitations may afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute frauds against the Government. The United States, however, is engaged in a gigantic war program. Huge sums of money are being ex-

pended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and to prosecute frauds against the Government, it is recognized that in the varied dealings opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law-enforcement branch of the Government is also busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws.

Your committee is of the opinion that action should be taken at this time to extend the limitations statute so that frauds may be discovered and punished even after the termination of the present conflict, and to insure that the limitations statute will not operate, under stress of the present-day events, for the protection of those who would defraud or attempt to defraud the United States.

The proposed measure has been cleared with the legislative committee of the Department of Justice and with the Bureau of the Budget.



Nos. 12,597 and 12,607

United States Court of Appeals

For the Ninth Circuit

HARRY RENTON BRIDGES, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeals from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANTS' SUPPLEMENTAL BRIEF.

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APPELLANTS' SUPPLEMENTAL BRIEF.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVIC-
TION OF APPELLANT BRIDGES ON THE SECOND COUNT
OF THE INDICTMENT.

The second count of the indictment (Tr. 6-7)
charges that appellant Bridges did "wilfully and
knowingly make a false statement under oath" by
giving the following answer to the following question:

"Q. Do you now or have you ever, belonged
to the Communist Party in the United States?

A. I have not; I do not."

The answer so given is alleged to have been, "as
said defendant then and there knew",¹ false; it is

¹The indictment further alleges that "said defendant did not
then and there believe said answers * * * to be true, and the said
answers were * * * then and there believed and known to him to
be false." (Tr. 7.)

also alleged that “in truth and in fact said defendant at the time of so testifying belonged to and was a member of the Communist Party in the United States, and had belonged to and had been a member of said Communist Party in the United States from 1933 up to and including said 17th day of September, 1945.”

Thus the issue framed by the plea of not guilty was whether or not appellant Bridges had ever belonged to or been a member of the Communist Party in the United States and believed that he had. In order to determine that issue in its favor, the Government had to prove beyond a reasonable doubt that appellant Bridges had been a member of the Communist Party in the United States and believed that he had. Unless its proof established that fact—i.e., the fact of appellant Bridges’ actual membership in the Communist Party to his own belief—its evidence was insufficient to sustain the conviction.

The trial Court correctly recognized that evidence of sympathy with the aims of the Communist Party; casual or intermittent cooperation with it; association with it or even affiliation with it, did not constitute actual membership, and it so charged the jury (Tr. 7891-7893).

An analysis of the evidence proffered by the government on this issue shows that it is insufficient to sustain a conviction upon the basis of these very instructions which, so far as they went, correctly stated the law. The real difficulty with the instructions on this point is that while they told the jury what it

could *not* look to in order to convict, they did not with any precision advise the jury of the factors it *could* consider to justify a conviction.

In this regard the trial Court merely instructed the jury that whether or not appellant Bridges was a member of the Communist Party was a question of fact "which you are to determine from all of the evidence * * * direct as well as circumstantial" (Tr. 7892). This is contrary to the perjury rule in the federal Courts (*Clayton v. United States*, 284 F. 537, 539 [4 Cir., 1922]; *United States v. Otto*, 54 F. (2d) 277, 279 [2 Cir., 1931]; *Radomsky v. United States*, 180 F. (2d) 781, 782-3 [9 Cir., 1950]) and undoubtedly this error lead the jury to convict upon the basis of insufficient evidence.

For it is perfectly plain that the evidence offered by the government on the issue of appellant Bridges' alleged membership in the Communist Party does not establish the fact. Not only is it all circumstantial, and not only are the circumstances at least as consistent with the theory of nonmembership as with the theory of membership, but the very witnesses called by the government to establish membership proved conclusively that the evidence was insufficient to sustain this conviction.

I. EVIDENCE CONCERNING MEETINGS AND COOPERATION WITH ALLEGED COMMUNISTS.

The great bulk of the testimony offered by the government's witnesses had to do with the presence of appellant Bridges at meetings or gatherings which the government characterized as "communist". Practically every government witness made reference to such meetings and some of them testified to nothing else.

Yet this testimony—no matter how voluminous it was—is by the admission of the very witnesses who gave it, insufficient to establish membership in the Communist Party.

In the first place, the only basis that these witnesses had for designating the meetings as Communist Party meetings was their claimed knowledge that all the persons present were members of the Communist Party. But in turn these witnesses claimed that the persons present were members of the Communist Party because the witnesses had on some prior occasion seen them at Communist Party meetings. (Tr. 892, 905, 911, 935, 938, 982, 1913.)

This is literally lifting one's self by one's bootstraps!

Several of the government's witnesses were permitted to testify, over objection, to the communist character of these meetings despite the fact that there were present at such meetings persons whom they had never seen before or since and whose identity they were unable to establish. (Tr. 1799, 1801, 1820.)

In the second place—and the significance of this cannot possibly be overlooked—the government's witnesses testified, to their own knowledge, of the attendance at such very meetings of persons who were not members of the Communist Party.

John Schomaker testified that even prior to the time he claims appellant Bridges became a member of the Communist Party, appellant Bridges attended such meetings, including meetings held in the Communist Party offices. (Tr. 957-963.) K. C. Krolek testified that there were many meetings held between Communist Party members and trade unionists who were not Communist Party members. (Tr. 1957-1958.) This witness specifically declared:

“* * * that to people who were in the Communist Party as well as union leaders themselves, there were occasions at which, for practical purposes, a meeting could be considered a Communist Party meeting and yet have an outsider who may not have been a Communist Party member present at that meeting.

Q. That is exactly what I was probing to discover. In other words, there would be a real Communist Party meeting and yet there could be a person present, trade union leader or otherwise, who might not himself be a member of the Communist Party?

A. That is correct.” (Tr. 1964-1965.)

This witness gave specific incidents at which this occurred (Tr. 1965-1967) and admitted that even after he had left the Communist Party he attended at least one such meeting (Tr. 1961). This particular

meeting was one which on his direct examination he had said was attended by appellant Bridges and which he claimed was open only to Communist Party members. This was one of the meetings, therefore, upon the basis of which the government sought to prove its claim of membership against appellant Bridges. (Tr. 1927.) Yet the witness was in attendance at a time when he was not a member of the Communist Party!

Lewis H. Michener testified that before he joined the Communist Party he participated in discussions about labor matters with people whom he knew to be Communist Party members, and that as a matter of fact there were occasions when he was the only non-member present:

“Q. And in those discussions, would you be talking over matters of policy affecting your own union and the men who worked with you?

A. Yes, sir, that would be the general discussion would follow in that particular connection.”
(Tr. 3444.)

George Wilson also testified that prior to the time he claims to have joined the Communist Party he attended meetings of this character with members of the Communist Party. (Tr. 3652-3653.)

The witness Krolek testified to the distinction between Communist Party meetings whose attendance was limited to Communist Party members, and Communist Party meetings which were attended by persons who were not members of the Communist Party.

The former, he said, considered Communist Party affairs, such as party recruitment and organization, the latter were of "a strictly trade union nature". (Tr. 1967.)

Now the interesting thing about the meetings at which the government witnesses placed Bridges, is that every one of them were of "a strictly trade union nature".

For example, the witness Schomaker testified to a meeting at Grants Pass, Oregon, in 1936, at which
 " * * * the discussion was around the question of the determination [termination?] of the waterfront agreements with the employers [and]
 * * * the people in Tacoma, the longshore group in Tacoma, were rather hostile to the way the elections went [and]

We discussed the ways and means to bring the two—that is the northwest maritime groups—closer to the California and Southern California groups. And that was the extent of the discussion * * * " (Tr. 905.)

This same witness testified about a meeting held in 1935 during the sessions of the California State Federation of Labor convention in San Diego at which he said Bridges gave a report:

"Well, at that particular time in 1935 the beef centered around the sailors, the Sailors Union of the Pacific, and Paul Scharrenberg was secretary, and in that summer the sailors—Paul Scharrenberg was also secretary of the California Federation of Labor, and the sailors in

that year, that summer, they expelled him from the Sailors Union of the Pacific, although he still held his job as the California secretary of the State Federation of Labor. The sailors were pretty hot about this being so. They wanted him removed not only as the secretary of the Sailors, but also removed as the California State Federation of Labor secretary, and that was the main point in the convention as far as—that was one of the main points in the convention, that is, as far as we were concerned, as far as the maritime workers were concerned, and men, of course—the maritime unions had no representation outside of Scharrenberg in the Federation, so they sought and put some of our men either as vice president of one—I think our sub-district was No. 9, and we endeavored to get one of our persons as a vice president and also to run opposition, if possible, against Scharrenberg as secretary.” (Tr. 923-924.)

Stanley Hancock also testified about this meeting—as a matter of fact, this was the only incident² to which this witness testified.

Concerning it he said:

“We were interested in preparing a slate of nominees to oppose the vice-presidents of the American Federation of Labor, the California Division, and the Secretary of the State Federation.” (Tr. 1765.)

²The government must be contending (contrary to the testimony of its own witnesses) that attendance at such a meeting is proof of actual Communist Party membership, otherwise why did it call a witness to testify to this one incident alone?

“We had this meeting to discuss, and we did discuss, the individuals up and down the State that we would be willing to support on the floor of the convention for the positions of either vice-presidency or secretary”. (Tr. 1767.)

“In addition to the selection or endorsement of nominees for office in the State Federation of Labor, we discussed a number of resolutions which we were interested in placing before the convention.

Q. And what was the nature of these resolutions?

A. Well, there were several. One dealt with the desire—with our desire of having the Federation endorse a labor party. Another dealt with the convention going on record as opposing the criminal—California Criminal Syndicalism Law; another had to do with voicing determination against vigilante activities in Sonoma County. Another resolution was to condemn the arrest of some men popularly known as—the case was known as the Modesto case.” (Tr. 1772.)

“The aim of that resolution was to present an argument for the State Federation of Labor sponsoring a labor party, a California Labor Party.” (Tr. 1822.)

The witness Schomaker testified to a meeting in 1934 in Santa Clara County at which he said Earl Browder, the then secretary of the Communist Party, was present. Of this meeting he said:

“* * * We began discussing the strike and the progress it had made, and the general situation concerning the strike.” (Tr. 939.)

"We all discussed the strike and the aspects of it and what was to be expected in it, and the future conduct of it.

Q. Can you tell us to your best recollection what Mr. Browder said?

A. Well, the best of my recollection was that, the fact that there was quite a bit of terror being exerted on the strike from various sources, from the police and private agencies, tear gas salesmen that were applying pressure in the form of shooting tear gas into the strikers. And in general, the atmosphere was one of tension and Browder suggested that what needed to be done was to get more support for the strike. That is, more support for it, to line up people on the side of the strikers against these forces that were of terror and violence against them." (Tr. 940.)

Henry Schrimpf also testified about this same meeting. He said:

"And Darcy done quite a bit of talking about the general situation, and the functions of the strike." (Tr. 1360.)

"Well, the most important thing with our strike at this stage was holding the men together. The men, they had gone through an awful lot of hard times and abuse on the waterfront. But they were very short of money. We had no money when we went out, and most of the men were caught short, never had a chance to put a nest egg away. So the real object was in continuing this strike, how to bolster up the morale of the men. And naturally, an important issue of all strikes in supporting and building up and

holding the morale of the men is to continue to gather strong support from the outside. This I do recall was one of the facts there, and what would be the best means and the best result and how we would get more support not only from organized labor, but from the general public.” (Tr. 1361-1362.)

The witnesses Krolek and Mervyn Rathborne testified to a meeting held in Long Beach in 1936 during sessions of a convention of the Maritime Federation of the Pacific, an organization composed of various maritime unions. Krolek described the meeting:

“The meeting itself was concerned with discussion pertaining to the slate of progressive candidates that would be recommended on the floor of the Maritime Federation of the Pacific Convention which was being held currently at that time. I believe that was the main purpose—the discussion of the individuals from the standpoint of presidency, vice-presidency, secretaryship and so forth—minor officials—of the Maritime Federation of the Pacific for the forthcoming year, and the program that was to be—was to have been determined upon at this meeting was the proponency or the sponsorship of certain people who the communists, *shall we say*, and THE LIBERAL MOVEMENT combined felt to be to the best interests of the Maritime Federation of the Pacific.” (Tr. 1918-1919.)

“Everyone that was present at that meeting partook of the general discussion and the matter, the paramount matter of prime importance was

the determination, the selection of the candidates, the sale of officers who would be supported by THE PROGRESSIVE ELEMENT in the currently held Maritime Federation Convention." (Tr. 1923.)

The witness Michener testified to only two meetings³. Both of them were meetings attended by labor representatives who had a legitimate interest in the problems discussed because the problems discussed were exclusively labor problems.

The first one was a meeting late in 1940 in San Francisco.

"The problem regarding Labor's Non-Partisan League at that time was the allocation of funds between the northern part of the State and the southern part of the State * * * to see what arrangements could be worked out regarding the allocating the funds between Northern California and Southern California of the Labor's Non-Partisan League funds.

The Labor's Non-Partisan League, your Honor, was the political arm for the CIO during that period of time * * *

The net result of the discussion on Labor's Non-Partisan League * * * was that the funds should be equally distributed between the Northern and Southern Divisions of California." (Tr. 3346-3348.)

The second meeting that he attended was in November, 1943, at Philadelphia during the course of a

³See note 2, supra.

National CIO Convention. It had to do with the substitution of one CIO official for another in a California State CIO job. (Tr. 3360-3363.)

Both George Wilson and Mervyn Rathborne testified to a meeting in the Governor Hotel in San Francisco which took place some time between 1942 and 1944. The subject of the discussion was the settlement of the controversy that had arisen between Rathborne, as Secretary of the California State CIO Council, and one Goldblatt, as Secretary-Treasurer of the International Longshoremen's & Warehousemen's Union. The occasion for the conference being held at the Governor Hotel was the fact that Rathborne had a room there during the then pending State CIO Convention. (Tr. 3649-3652, 5885.)

From the foregoing it appears that the evidence just discussed could not be regarded as probative of membership in the Communist Party upon any basis. In other words, merely proving that appellant Bridges occasionally and intermittently met with persons claimed to be members of the Communist Party and discussed with them matters of trade union concern, does not begin to prove that he was an actual member of that party.

More than that, this evidence clearly does not and cannot establish the basis for a belief on the part of appellant Bridges that the answer he gave in 1945 was false and not true. On the contrary, when he testified in 1945, Bridges well knew that the agencies and courts which had passed upon the question re-

garded such evidence as insufficient to establish affiliation with, let alone membership in, the Communist Party.⁴ On the basis of such evidence alone, therefore, it cannot be said that appellant Bridges knew or believed his testimony was contrary to the truth.

It is next contended by the Government, and several of its witnesses testified, that appellant Bridges was a member of the Communist Party because he "followed instructions" of persons described to be communists. The Government's evidence is very hazy and indecisive as to just how these instructions or directions were communicated from the Communist Party to Bridges, and it is based upon the preposterous proposition that the needs and demands of the longshoremen on the West Coast in 1934 and 1936 were not real but were the figment of the imagination of Communist Party officials. It is a proposition too ludicrous to be accepted by this Court.

The fact of the matter is that, insofar as it was possible to get any specificity from the Government's witnesses, their evidence revealed that the so-called instructions which appellant Bridges was supposed to have received from, and followed at the direction of, the Communist Party, were all matters dealing with bona fide, legitimate, trade union problems that had nothing whatsoever to do with the question of communism.

⁴The expressions of the Courts in this regard are considered below.

Among the instructions seriously suggested by the Government's witnesses as evidence of Bridges' Communist Party membership were instructions "to build the union", to "raise the demands of the men", to "proceed up and down the coast with the Rank and File committee", "the setting of a date for the strike," (Tr. 889), "the organization of the Maritime Federation of the Pacific" (Tr. 891), "to consider the best strategy and tactics in the strike" (Tr. 906), "the question of revitalizing the ILA [union]". (Tr. 968, 971-2.)⁵

The demands, which it was testified the Communist Party instructed appellant Bridges to raise, were "a dollar an hour and a six hour day and a 30-hour week, and a hiring hall". (Tr. 978.)

Government witnesses testified that Bridges accepted such advice or instructions "because it was a chance to build a union". (Tr. 972.)

The witness Schomaker admitted that these demands had nothing to do with communism, that they were ordinary, good trade unionism. (Tr. 1182-84.) The witness Schrimpf supported this view. He stated that all through the 1934 strike the objectives which he ascribed to the Communist Party were first, to keep up the morale of the men, second, to eliminate the bad working conditions, third, to get some

⁵The evidence dealing with articles written by Bridges for the *Waterfront Worker* falls into the same category. It is clear that even if some members of the Communist Party had an interest in this paper, Bridges was concerned with utilizing it to help build the union. (Tr. 821, 831.)

kind of job security, and finally, to improve the working hours. (Tr. 1398-1400.) All of these, he admitted, were legitimate trade union objectives and all were finally adopted by the President's Board which was appointed to settle the strike. (Tr. 1000, 1409.)

Finally, this witness admitted that to the extent that Bridges and the others took any advice or assistance from any Communist Party members, they did so because the men who were seeking to organize and build the union were then young, inexperienced and new in this field, whereas the Communist Party members involved were experienced and competent trade unionists. (Tr. 1389, 1401.)

These dealings of the appellant Bridges with members of the Communist Party were not denied by him, nor have they been over the years. Judge Healy said

“In the main there is no dispute concerning these circumstances. The bulk of them had long been known alike to the authorities and the general public, and were freely admitted by the alien himself. Nearly all of them had been evaluated and discarded by Inspector Landis and by the Department upon the first trial.” (*Bridges v. Wixon*, 144 F. 2d 927, 940 [9 Cir. 1944].)

The Courts had held that this course of conduct did not constitute even “affiliation” with the Communist Party, much less membership in it. Justice Douglas said:

“But he who cooperates with such an organization only in its *wholly lawful activities* cannot

by that fact be said as a matter of law to be 'affiliated' with it. Nor is it conclusive that the cooperation was more than intermittent and showed a rather consistent course of conduct. Common sense indicates that the term 'affiliation' in this setting should be construed more narrowly. Individuals, like nations, may cooperate in a common cause over a period of months or years although their ultimate aims do not coincide. Alliances for limited objectives are well known. Certainly those who joined forces with Russia to defeat the Nazis may not be said to have made an alliance to spread the cause of Communism. An individual who makes contributions to feed hungry men does not become 'affiliated' with the Communist cause because those men are Communists. A different result is not necessarily indicated if aid is given to or received from a prescribed organization *in order to win a legitimate objective* in a domestic controversy. Whether intermittent or repeated, the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the prescribed organization as distinguished from mere cooperation with it in its lawful activities. The act or acts must evidence a working alliance to bring the program to fruition." (*Bridges v. Wixon*, 326 U.S. 135, at 143-144 [1945].)

It will be noted that in order to constitute even affiliation, the Court held that the act or acts in question must evidence a working alliance to bring "the

program" to fruition. That is to say, the program of the proscribed organization. Here, if there was a working alliance, it was only a working alliance to bring to fruition *the program of the Union*.

Taking this evidence at its strongest, it is clear that it falls far short of independently establishing either the fact or membership or Bridges' belief that the statement given under oath in Judge Foley's Court was not a true statement.

The lack of substantiality of this evidence and of the entire record in this case brings to mind Judge Healy's observation that:

"It is notable that the alien in one fashion or another has been under almost continuous investigation for a period of more than five years. Prior to and during the course of the second trial, the service had enlisted the powerful cooperation of the Federal Bureau of Investigation. The country had been scoured for witnesses. Every circumstance of Bridges' active life had been subjected to scrutiny and presumably no stone left unturned which might conceal evidence of the truth of the charges which the alien so flatly denied. The most significant feature of the inquiry as it seems to me is the paucity of the evidentiary product as contrasted with the magnitude of the effort expended in producing it * * *" (*Bridges v. Wixon*, supra, 144 F. (2d) at 940.)

Finally, one cannot get away from what Justice Douglas said about the import of evidence of this kind.

“So far as this record shows the literature published by Harry Bridges, the utterances made by him, were entitled to that [constitutional] protection. They revealed a militant advocacy of the cause of trade unionism *but they did not teach or advocate or advise the subversive conduct* condemned by the statute.

“Inference must be piled on inference to impute belief in Harry Bridges of the revolutionary aims of the groups whose aid and assistance he employed in his endeavor to improve the lot of the working man on the waterfront. That he enlisted such aid is not denied. He justified that course on the grounds of expediency—to get such help as he could to aid the cause of his union. But there is evidence that he opposed the Communist tactics of fomenting strikes; that he believed in the policy of arbitration and direct negotiation to settle labor disputes, with the strike reserved only as a last resort. As Dean Landis stated in the first report:

‘Bridges’ own statement of his political beliefs and disbeliefs is important. It was given not only without reserve but vigorously as dogma and faiths of which the man was proud and which represented in his mind the aims of his existence. It was a fighting apologia that refused to temper itself to the winds of caution. It was an avowal of sympathy with many of the objectives that the Communist Party at times has embraced, an expression of disbelief that the methods they wished to employ were as revolutionary as they generally seem, but it was unequivocal in its distrust of tactics other than those that are generally included within the concept of democratic methods.

That Bridges' aims are energetically radical may be admitted, but the proof fails to establish that the methods he seeks to employ to realize them are other than those that the framework of democratic and constitutional government permits.''' (*Bridges v. Wixon*, *supra*, 326 U.S. at 148-149.)

II. OTHER EVIDENCE.

A. The alleged admission.

The government produced two witnesses, Shomaker and Irene Harris, who testified to an alleged oral unsworn admission by appellant Bridges that he was a member of the Communist Party.

This evidence is inherently improbable.⁶ This Court is asked to believe that appellant Bridges made such an admission at a public gathering with many strange and unknown persons present, at a time when he was under arrest on a warrant of deportation which was based upon the very claim of such membership. Appellant Bridges, as the record shows, had been under surveillance and knew he had been under surveillance for many years. He had, and he knew he had, many powerful enemies. The country had been scoured, as he knew, for any evidence of any kind that would connect him with the Communist Party. And yet for no good reason, at a small gathering of this kind when no important or useful function could be served, he is claimed to have made an admission

⁶ "It is a wild conceit that courts are bound by mere swearing. It is credible swearing which is required."

which would expose him utterly to any stranger in the group who would then be in a position to deliver him to his enemies. It is just too much to believe that such an incident ever took place.

The law quite correctly regards admissions with extreme caution since evidence of this type is easy to assert but almost impossible to disprove. It is subject moreover to the great danger of misinterpretation. The loose use of language, particularly in connection with matters here under consideration, is commonplace. Even astute witnesses and law enforcement officers constantly fall into the error of failing to discriminate in using the word "communists" and "members of the Communist Party". Examples of this in the testimony of the witnesses and the statements of the government prosecutors run throughout the record.

Appellant Bridges himself has repeatedly stated, and undoubtedly did on the occasion under consideration, that he and his union supported certain programs and policies and would continue to support such programs and policies despite the fact that others called them "communistic". He testified in connection with this very incident that in all probability he said: "Look; here is what we stand for; here is what we are trying to do. Here is our program. Here is what we are trying to do. If these things are communistic, then we are communists." (Tr. 4897.) The distinction between this statement and a statement that appellant was a member of the Communist Party is of course tremendous.

Furthermore, the testimony in question is not the independent testimony of two separate witnesses. The record is clear that just shortly prior to the time of the trial one of the witnesses had brought the alleged incident sharply to the attention of the other. (Tr. 1725).

Finally as a matter of law, oral unsworn admissions uncorroborated—as was this one—do not fit the special rule relating to the sufficiency of evidence in perjury cases.

U. S. v. Wood, 14 Pet. 430 (1840);

Clayton v. U. S., 284 F. 537, 540 (4 Cir., 1922);

Phaer v. U. S., 60 F. (2d) 953, 954 (3 Cir., 1932);

Hart v. U. S., 131 F. (2d) 59, 61 (9 Cir., 1942);

Fotie v. U. S., 137 F. (2d) 831, 840 (8 Cir., 1943).

B. The alleged application of appellant Bridges for membership in the Communist Party.

Schomaker testified to an alleged incident with respect to the signing of an application card for membership in the Communist Party by appellant Bridges. However, this testimony has an interesting aspect, an aspect which reveals its utter falsity. After a very elaborate build-up concerning the preliminary circumstances under which this alleged application for membership was allegedly executed by appellant Bridges (Tr. 833-840) this witness stated that he was called out of the restaurant where he, Bridges and a third person had been, remained away for fifteen or twenty

minutes, and did not see Bridges again on that occasion. (Tr. 841.) In other words according to his own testimony he left and was not present at the time that Bridges allegedly signed an application card for membership in the Communist Party. His testimony that Bridges did sign a card is therefore hearsay and at best highly circumstantial. Not only was this testimony uncorroborated from any other source and flatly denied by Bridges (Tr. 4899-4900), but the third person whom Schomaker said was present and the only one besides Bridges who could therefore possibly know the facts, categorically denied that the incident had ever occurred (Tr. 3813-3814, 3880).

In any case since there was no corroboration of Schomaker on this point the evidence was insufficient to sustain a conviction in view of the rule required in perjury cases.⁷

C. The alleged payment of dues and the receipt of Communist Party membership books.

The same witness Schomaker testified that for several years after 1934 he received from Bridges old Communist Party membership books in return for which he gave to Bridges new books, claiming that this was part of a procedure by which the Communist Party "controlled" (Tr. 867-873) its membership. This witness also testified that he saw Bridges pay what he, the witness, characterized as Communist Party dues to persons whom he, the wit-

⁷See *infra*, pp. 25-28.

ness, testified were Communist Party dues secretaries. Over objection the witness was permitted to characterize both the money and the people, without any adequate foundation having been laid. (Tr. 873-874.)

This testimony like the earlier testimony of this witness was uncorroborated, was flatly denied by Bridges (Tr. 4900), and in no case did the government produce any of the witnesses to whom Schoemaker made reference. There was no showing that they were not available to the government, on the contrary the record indicates that at least one of them—Mann—had been interviewed by a government agent and subpoenaed to appear before the grand jury which returned the indictment. (Tr. 3605; Def. Ex. K-1.) In any case the burden of establishing the fact beyond a reasonable doubt, and of properly corroborating it as required by the perjury rule, was on the government. There was no burden upon appellant Bridges to meet the testimony which was not properly in the record and which was not sufficiently corroborated to sustain a finding against him.

It has long been the law in perjury cases that testimony of one witness is not sufficient to sustain conviction; there must be at least the testimony of two independent witnesses or the testimony of one witness plus independent evidence which is inconsistent with the innocence of the defendant.

Undoubtedly the government will argue that Scho-maker's testimony now under consideration is corroborated by the testimony of Bridges' attendance at the meetings which we have described above. However such testimony, as we have already seen, is not inconsistent with the innocence of Bridges. On the contrary, the government witnesses who gave it clearly established by their own evidence this testimony does not have the slightest probative value on the question of actual membership in the Communist Party. That being the case, such testimony cannot be regarded as legally sufficient to corroborate Scho-maker.

In *United States v. Isaacson*, 59 F. (2d) 966, 967-968 (2 Cir., 1932), the Court said:

“The ancient rule that required the testimony of at least two witnesses to prove the crime of perjury has, indeed, been relaxed. *Hashagen v. United States* (C.C.A.) 169 F. 396. But what may be called the modern equivalent of this requirement still obtains. This general rule now requires the oath of one witness to be supported by that of another or by some *other independent evidence inconsistent with the innocence of the defendant*. *United States v. Wood*, 14 Pet. 430, 10 L. Ed. 527; *Allen v. United States* (C.C.A.) 194 F. 664, 39 L.R.A. (N.S.) 385; *United States v. Otto* (C.C.A.) 54 F. (2d) 277. Otherwise there would be but oath against oath and on the theory, I suppose, that each would give the other the lie direct, there would be no sound basis for letting a jury reach the conclusion that

the oath against a defendant so overbalanced his own that his guilt was proved beyond a reasonable doubt. At least, this puts the requirement on rational ground as was pointed out in *Cohen v. United States* (C.C.A.) 27 F. (2d) 713. That case dealt with subornation of perjury, but the principle involved is the same. *Hammer v. United States*, 271 U.S. 620, 46 S. Ct. 603, 70 L. Ed. 1118."

Several years later a determined effort was made by the government to convince the Supreme Court that this rule should be abandoned in perjury cases. However, the Court unanimously rejected the government's position, and in *Weiler v. United States*, 323 U.S. 606, 608-611 (1945), said:

"The special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in past centuries. That it renders successful perjury prosecution more difficult than it otherwise would be is obvious, and most criticism of the rule has stemmed from this result. It is argued that since effective administration of justice is largely dependent upon truthful testimony, society is ill-served by an 'anachronistic' rule which tends to burden and discourage prosecutions for perjury. Proponents of the rule on the other hand, contend that society is well-served by such consequence. Law-suits frequently engender in defeated litigants sharp resentments and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty

and spiteful retaliation in the form of unfounded perjury prosecutions.

The crucial role of witnesses compelled to testify in trials at law has impelled the law to grant them special considerations. In order that witnesses may be free to testify willingly, the law has traditionally afforded them the protection of certain privileges, such as, for example, immunity from suits for libel springing from their testimony. *Since equally honest witnesses may well have differing recollections of the same event*, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon 'an oath against an oath.' The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.

Whether it logically fits into our testimonial pattern or not, the government has not advanced sufficiently cogent reasons to cause us to reject the rule * * *

* * * The court below held, and the government argues here, that it is solely the function of the judge finally to determine whether a single witness and sufficient corroborative evidence have been presented to sustain a conviction. Two elements must enter into a determination that corroborative evidence is sufficient: (1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the

corroborative evidence is trustworthy. To resolve this latter question is to determine the credibility of the corroborative testimony, a function which belongs exclusively to the jury. Thus, to permit the judge finally to pass upon this question would enable a jury to convict on the evidence of a single witness, even though it believed, contrary to the belief of the trial judge, that the corroborative testimony was wholly untrustworthy. Such a result would defeat the very purpose of the rule, which is *to bar a jury from convicting for perjury on the uncorroborated oath of a single witness.*"

III. THE TESTIMONY OFFERED BY THE GOVERNMENT IS NOT WORTHY OF BELIEF.

A careful examination of the circumstances under which the various witnesses for the government testified indicates that their testimony must be viewed with the gravest suspicion. It is more than a coincidence that, since the chief branch of the government interested in advancing the cause of this prosecution was the Immigration and Naturalization Service, a good many if not a majority of the government's witnesses were persons who in one way or another had some previous contact with that agency, and who, it is clear, had much to fear in way of possible reprisals should they incur the ill-will of any of the officials of that agency.

The witnesses Schrimpf, Krolek, Irene Harris, and Ross are all naturalized citizens. In the case of

Krolek and Ross citizenship was claimed to be "derivative" based upon the alleged citizenship of their fathers. In the case of Mrs. Harris it was necessary for her to reinstate citizenship which she had lost by marriage to an alien. Schrimpf, like Bridges, had been born in Australia.

The interesting thing in the case of Schrimpf is the fact that he claimed Bridges to have been a member of the Communist Party during precisely the same time he admits to membership. Yet he had no difficulty in becoming naturalized in 1943, at a time when he was required to and did swear under oath that for ten preceding years he had not been a member of or affiliated with any organization which taught or advocated the overthrow of the government by force and violence. By his own admission, then, Schrimpf lied when he obtained his citizenship in 1943.⁸ By the government's theory on the statute of limitations, Schrimpf was liable to prosecution for the precise crime alleged in the second count of the indictment at the time he testified against Bridges in 1949.⁹

⁸This must follow if the question put to Bridges in 1945 relating to membership in the Communist Party was material to the inquiry before Judge Foley.

⁹In this connection it is interesting to note the prosecutor's suggestion that membership in the Communist Party did not make false a negative answer to the question with respect to membership in an organization teaching or advocating overthrow of the government by force and violence at the time of Schrimpf's naturalization. (Tr. 5777.) If the prosecutor was right in this regard, then of course the question put to Bridges in 1945, and upon which the second count of the indictment is based, was an immaterial question. (See Appellant's Opening Brief, 175-180.)

In addition to the fact that many of the witnesses were aliens who at one time or another had had relations with the Immigration and Naturalization Service which undoubtedly would make them more amenable to whatever pressures that service exercised to procure witnesses against Bridges, is the fact that at least two of the witnesses had been government employees and had also answered in the negative questions concerning past membership in subversive organizations, despite their present admission that they had been members of the Communist Party. We refer to the witnesses Wilson and Michener. In the case of Michener, it is interesting to note that his personnel file for some reason or another was incomplete and, although there was every indication from the record that he took the oath in question, the oath itself was not contained in the file. (Tr. 5755-5770.)

In the next place, the record reveals other pressures to which government witnesses were subjected. Rathborne, for example, had been voting continuously in both state and federal elections despite the fact that since 1928 he had been convicted of a felony. (Tr. 6025-6028.) It is interesting to note here that the Immigration and Naturalization Service, which should have had nothing to do with these matters (for Rathborne apparently was not an alien), took it upon itself to have the District Director of Immigration and Naturalization in San Francisco arrange with the Los Angeles Superior Court, shortly before

Rathborne was due to testify, to have the felony record "expunged". (Tr. 6410-6419; 6900-6921.) Of course this does not change the fact that prior to the time the record was expunged Rathborne had been repeatedly violating the law.

In the next place, the record shows a continuous and constant exertion of pressure by Immigration Service agents against practically every one of the witnesses from the time the agents approached a witness until they finally induced him to testify; they spent days, weeks, and months in constant and repeated visits and interviews. They went from coast to coast and found people in the most unlikely places. Stanley Hancock was found in Erie, Pennsylvania, and Lawrence Ross in Memphis, Tennessee. Hundreds of pages of record are devoted to the comings and goings of Michener and the immigration agents in Los Angeles (Tr. 3379-3422), and Rathborne and the immigration agents in and around the Bay Area, Los Angeles, and Washington, D. C. (Tr. 6035-6165).

In many cases the witnesses told the agents that they knew nothing of Bridges' alleged Communist Party membership, but the agents kept after them and after them until finally they were compelled to testify.

In the case of at least two witnesses the record is clear that substantial sums of money were paid for their testimony. Although an effort was made to disguise these payments as witness fees or salary, it is perfectly obvious that in the case of both Crouch and

Rathborne the fees were given directly for the testimony. There was no reason why the witness fees in the case of Crouch should have been doubled by paying a similar set of fees to his wife, and there is no reason why in the case of Rathborne the government should have expended the sum of \$5,000 to procure his testimony. (Tr. 6152, 6538-6552.)

Another phenomenon which we find in this case is the appearance of the professional witness. Both Crouch and Johnson had been used over and over again by the government in other proceedings. Johnson had testified in almost two dozen cases before he testified against Bridges. (Tr. 2111-2126.) Crouch had already testified in about ten cases in the short space of six or seven months before he was called as a witness in this one. (Tr. 2477-2487.) For their services these men were handsomely rewarded. It is perfectly obvious they would testify to anything in order to maintain their positions. They had nowhere else to turn, and unless they made themselves useful to the government in the prosecution of this and similar cases their only source of livelihood would be destroyed.

There is a final factor to be considered in connection with the testimony of these witnesses. It is precisely because they exist at all times on the mercy of the government and must maintain their standing with the government, that they have no compunction about committing the most flagrant and obvious kind of perjury. Crouch and Johnson were caught in the

most barefaced lie when they said that they saw Bridges at a meeting of the Central Committee of the Communist Party in New York on or about June 27, 1936. The record is clear beyond a shadow of a doubt that Bridges was in Stockton, California, on that date. Yet these two men, who must have known that they did not see Bridges in New York when they said they did, had no hesitation about testifying to this false fact. The fact that the government has not taken steps against them, and that they are still today being used as professional witnesses in other cases, shows the freedom that these men feel from the normal restraints which otherwise inhibit other witnesses.

The same is true to an even more startling degree of witness Ross. The falsity of his testimony was not revealed by objective contradictory evidence, as was the falsity of the testimony of Crouch and Johnson; the evidence of his perjury came from his own lips. For almost a week this witness sat on the witness stand and repeatedly lied concerning his name, his background, his origin, his education, and related subjects. Not only did he lie about these matters on his direct examination, but he lied about them on his cross-examination, and it was not until it became perfectly obvious that further examination was going to destroy the whole fabric of falsehood he had created that he confessed to his perjury. Yet this man, too, has never been called to account for the perjury which he committed in the United States District

Court for the Northern District of California. He too has been permitted to leave the jurisdiction and go on his way.

In connection with this witness it is significant to observe that although government counsel admitted that it was even apparent to them that the witness was not testifying truthfully as of a late Friday afternoon (Tr. 3314)¹⁰ that same counsel tried with all the vigor at his command to have the witness excused and removed from the jurisdiction (Tr. 3143-3158), so that the falsehoods which were about to be exposed would never be exposed. There is no question that were it not for the timely intervention of telegraphic information late Friday afternoon (Tr. 3148, 3152) this witness would have been excused and permitted to go his way without his falsehoods ever having been revealed.

The final witness to be considered in this regard is Rathborne, who freely admitted to more than a dozen incidents of perjury before investigating committees of the House of Representatives and the Legislature of the State of California. In explaining those perjuries the witness committed further perjury in this very proceeding. He offered the explanation that, having been subpoenaed before the House committee, he consulted with an alleged leading officer of the Communist Party and was instructed to commit

¹⁰It is interesting to note that as soon as cross examination of this witness began to touch upon matters dealing with his personal life vigorous objections were interposed by government counsel. (Tr. 3100-3102.)

perjury. (Tr. 5937, 5947, 5975.) This, of course, would hardly excuse the commission of perjury; but the very explanation itself was false, for the record revealed that far from having been subpoenaed this witness voluntarily requested an opportunity to appear before the House Committee. (Tr. 5983.) When confronted with the record, he admitted that his previous testimony in this very trial was false and he further admitted that when he requested the opportunity to appear before the House Committee he did so fully intending to give perjured testimony. (Tr. 5986-5988.)

This witness, perhaps more than any other, expressed the utter impossibility of ascertaining when he was telling the truth. The following excerpts from his testimony speak eloquently on this subject.

“Q. Now, Mr. Rathborne, as a matter of fact, you never have been a member of the Communist Party, have you?

A. I testified and I was a member of the Communist Party from 1935 until early in 1947.

Q. When did you testify to that?

A. I believe on direct examination.

Q. You testified to it under oath, as you understand it?

A. Well, I was under oath at the time, and I will state that now.

Q. In other words, being sworn to tell the truth, the whole truth and nothing but the truth, you testify that for a certain period of time you had been a member of the Communist Party, is that right?

A. That's right. I repeat that testimony now.

Q. Back in 1940, and subsequently in 1941, being put under oath and sworn to tell the truth, the whole truth and nothing but the truth, first before the Un-American Activities Committee of Congress, and next before the Tenney Committee of the State Legislature, being asked that question, you denied that you had ever been a member of the Communist Party; isn't that right?

A. That is right.

Q. And the two answers embraced the same period, isn't that right?

A. Well, yes; I mean the same period is included.

Q. You were under oath on both occasions?

A. That's right.

Q. Do you know of any way—can you tell me of any way by which one can determine which time you were telling the truth?

* * * * *

A. As far as my appearance in this proceeding, I can only say what I said before: It is up to the Court and the jury based on the evidence that I give and the evidence that other witnesses give, to determine the value or the weight and the truthfulness of my testimony * * * And I will state, if you want me to, that I am doing my utmost to adhere strictly to the truth in this testimony I am giving now.

Q. You said that down at Washington, didn't you, and you said that before the Tenney Committee. What I want to know is this—

A. Apparently in that there is an irreconcilable contradiction which you cannot reconcile." (Tr. 6622-6624.)

“Q. Let us get back to the original situation. Therefore, a person who is a Communist under such direction or education can deny under oath that he is a member of the Communist Party, can't he?

A. He can, yes.

Q. He can deny that another member is a member of the Communist Party?

A. That is right.

Q. Even though that person might be a member of the Communist Party?

A. That is right.

Q. He can also say that another person who is not a member of the Communist Party is a member of the Communist Party, can't he?

A. Well, I don't know of any particular incident, but following the line of reasoning, I would say that would be logical.

Q. All right. He could also state falsely that he had left the Communist Party, couldn't he?

A. I suppose he could.

Q. In other words, being still in the Communist Party, he could pretend that he had left the Communist Party, couldn't he?

A. I presume he could. I don't know of any instance of that kind.

Q. And having left the Communist Party, he could pretend that he was still in the Communist Party, couldn't he?

A. I guess any of those combinations of circumstances would be covered by the general—

Q. And he could, if there were a meeting of certain persons, he could falsely state that it was not a Communist meeting, couldn't he?

A. I believe that is right, yes, sir.

Q. And he could falsely state it was a Communist meeting, couldn't he?

A. I believe he could——" (Tr. 6627-6628.)

The foregoing demonstrates that the evidence is circumstantial, uncorroborated, incredible, and totally insufficient to sustain the conviction of appellant Bridges on the second count of the indictment.

Dated, San Francisco, California,

September 7, 1951.

Respectfully submitted,

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No. 12599

United States
Court of Appeals
for the Ninth Circuit.

JAMES MARTIN MacINNIS,

Appellant.

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
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FILED

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PAUL P. O'BRIEN,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Northern District of California, Southern
Division.

No. 32117-H

In the Matter of

CONTEMPT OF COURT ON THE PART OF
JAMES MARTIN MacINNIS

ORDER ON CONTEMPT

On the first day of February, 1950, the defendant
appeared in person.

It is adjudged that the defendant is guilty of con-
tempt of court for misconduct during the judicial
proceeding in United States v. Harry Renton
Bridges, Henry Schmidt and J. R. Robertson, No.
32117-H, as specified in the accompanying certificate.

It is ordered that the defendant appear before
this Court for sentence upon the termination and
conclusion of the trial stages in United States v.
Harry Renton Bridges, Henry Schmidt, and J. R.
Robertson, No. 32117-H.

It is further ordered that the Clerk deliver a cer-
tified copy of this Order on Contempt and the ac-
companying Certificate to the United States Marshal
or other qualified officer.

Certified this 28th day of February, 1950, at San
Francisco, California.

/s/ GEORGE B. HARRIS,

United States District Judge.

[Endorsed]: Filed March 1, 1950.

[Title of District Court and Cause.]

CERTIFICATE IN CONFORMITY WITH
RULE 42(a) FEDERAL RULES OF CRIM-
INAL PROCEDURE

In conformity with Rule 42(a), Federal Rules of Criminal Procedure, I hereby certify that the conduct for which the defendant is punished for criminal contempt was committed in my presence and was seen and heard by me during a session of the United States District Court for the Northern District of California, Southern Division, under the following circumstances:

On the morning of Wednesday, February 1, 1950, following the examination by counsel for defendant and counsel for the Government, of the witness, Father Paul Meinecke, the Court had occasion to interrogate the witness. After propounding several questions, the Court asked a proper and pertinent question, directed toward the physical well-being of the witness, to wit:

Q. Have you been recently subjected to medical treatment, Father?

(Tr. p. 4794, lines 20-21.)

Following such question, Mr. MacInnis jumped to his feet, participated in a critical remonstrance of the Court, at the conclusion of which he stated to the Court in a belligerent manner in the presence of the jury, to wit:

Mr. MacInnis: I think you should cite yourself for misconduct.

The Court: Ladies and gentlemen——

Mr. MacInnis: I have never heard anything like that. You ought to be ashamed of yourself.

(Tr. p. 4796, lines 2-6.)

The entire record of the testimony of Father Paul Meinecke, designated Exhibit A, is attached hereto, and is made a part of this Certificate.

Certified this 28th day of February, 1950, at San Francisco, California.

/s/ GEORGE B. HARRIS,
United States District Judge.

Exhibit A

February 1, 1950—10:00 a.m.

The Clerk: The United States of America v. Harry Renton Bridges, Henry Schmidt and J. R. Robertson, on trial.

Mr. MacInnis: May we interrupt with another witness, your Honor?

The Court: Yes.

Mr. MacInnis: Will the bailiff please call Father Paul Meinecke.

FATHER PAUL MEINECKE

called for the Defendants; sworn.

The Clerk: Will you state your name to the Court and Jury.

The Witness: My name is Father Paul Meinecke.

(Testimony of Father Paul Meinecke.)

The Clerk: Will you spell the last name.

The Witness: M-e-i-n-e-c-k-e.

Direct Examination

By Mr. MacInnis:

Q. Father Meinecke, you are a duly ordained priest in the Roman Catholic Church?

A. That is correct.

Q. And you have been a priest and duly ordained and acting as such for about how many years?

A. Almost twenty years a priest.

Q. Where are you stationed now, Father Meinecke?

A. I have my own parish in Eureka [4765*] Nevada.

Q. And who is your superior?

A. His Excellency Bishop Thomas K. Gorman, Bishop of Reno.

Q. His office and his cathedral is in Reno, Nevada, is that correct? A. That is correct.

Q. Previous to the last few years were you in San Francisco.

A. I was stationed here as an assistant in a parish for about ten years.

Q. What parish was that, Father Meinecke?

A. That was St. Boniface Church, right here in the neighborhood.

Q. And what were the ten years approximately in which you served as assistant in St. Boniface Church?

* Page numbering stamped at top of page of original Reporter's Transcript.

(Testimony of Father Paul Meinecke.)

A. I would say about from 1936-37 to the following ten years.

Q. Now, while you were at St. Boniface Church you were known as Father Paul in the monastery at St. Boniface, is that correct.

A. That is correct. In a religious order it is more or less the custom that you are addressed by your first name rather than your last name.

Q. And as I understand it, after that time you received a papal dispensation to be transferred to do missionary work in Nevada?

A. That is right, with the full approval of my superiors.

Q. And what is the nature of the missionary work in which you are now engaged in addition to your duties as the head of a [4766] parish?

A. Well, like I told you before, I have my own parish there in Eureka, but there are not too many priests in Nevada. We are called on to do a lot of extra work, and I not only take care of Eureka, I take care of Austin, that is about 70 miles east of the town of Eureka and the next town. I also take care of the parish of McGill, Ruth, Caliente and Pioche, a distance of about 500 miles.

Q. Those towns are denominated as missions in the course of your work, is that correct?

A. Not exactly. They are real parishes. If there were enough priests working in Nevada we would have an ordained pastor in every one of those parishes.

(Testimony of Father Paul Meinecke.)

Q. But what I mean is, you travel from one place to another?

A. That is right. I cover all my parishes at least once a month.

Q. While you were in San Francisco, Father Meinecke, did you at any time become interested in the labor movement in San Francisco?

A. Yes, I was very much interested in it, as many other priests are, too.

Q. Did you have anything to do with the forming of the association of Catholic Trade Unions in San Francisco?

A. Well, Mr. MacInnis, some people forget things, but it has always been one of my very happy memories that I conceived the [4767] idea of organizing that association and bringing it here to San Francisco, that is, the Association of Catholic Trade Unionists, which I believe is still in existence.

Q. What was the purpose of that organization, Father Meinecke?

Mr. Donohue: Excuse me, Father. I am afraid I must object, if your Honor please. I assume that the witness was brought here as a character witness, and while interesting, this matter is not pertinent.

Mr. MacInnis: This is preliminary, your Honor, merely to show his relationship to one of the defendants.

The Court: I will overrule the objection.

Q. (By Mr. MacInnis): What was the purpose, Father Meinecke, of the Association of Catholic Trade Unionists?

(Testimony of Father Paul Meinecke.)

A. Oh, it is an instrument to—by which you can train and teach union people their duties and obligations toward the union, make them better acquainted with the principles of trade unionism. It isn't an organization that is opposed or separate from a trade union; it is a supplement; it is a place where we give them training, and it has its source in the Catholic Church. It was organized specifically at the wishes of Holy Father Pope Pius XI, who wanted such an organization.

Q. Now, Father Meinecke, in the course of your activities in connection with the labor movement, did you come to meet a man named Harry Bridges?

A. I did. Among many other labor leaders, I met Harry Bridges. [4768]

Q. When approximately did you first meet Harry Bridges?

A. Well, I couldn't say definitely. I couldn't give you the day or the hour or the place, but I would say that we were fairly good friends by about 1937-1938.

Q. What were the circumstances, if you can remember of your early meeting with him?

A. Well, due to my work, I had to make it my business to get to know those people, especially to know the leaders in the unions. And as I said before, I couldn't put my finger on the precise day, but I say by about '38 we were fairly good friends, because I was trying to rehearse my memory just when I met the gentlemen. But the earliest outstanding thing in my memory is I can remember Mr.

(Testimony of Father Paul Meinecke.)

Bridges coming over to our church one day and asking me if I could recommend a Catholic school for his daughter, and I believe that is the first time that I met his daughter. And if my memory doesn't fail me, I believe that I approached the authorities of St. Brigid's school here in San Francisco, and his daughter was placed there to his satisfaction. But I know that definitely at that time we were good friends, because he looked me up specifically for that purpose. [4769]

Q. In other words, from time to time Mr. Bridges visited you and I suppose you visited him, is that correct?

A. That is correct, and we met as a group.

Q. When you say, "We met as a group," do you have reference to any particular persons?

A. Other members of the trade union movement, people—even priests like myself who realize that is part of our work, something we should be interested in.

Q. Mr. Bridges, I take it, consulted you upon religious problems as well as upon problems connected only with the labor movement, is that correct?

A. That is correct. That is correct because he was a Catholic, although he was not a member of our parish, and certainly those things came up.

Q. Did your acquaintanceship or friendship with Harry Bridges remain constant during all of the years that you were here in San Francisco?

A. That is right.

(Testimony of Father Paul Meinecke.)

Q. Did you from time to time discuss Harry Bridges with other persons in this community and did you hear his name mentioned by other persons?

A. He was a very frequent topic of conversation.

Q. When I suggest that he may have been a topic of conversation, I have reference to his reputation in this community for truth, honesty and integrity. Did you hear those qualities discussed [4770] by people in this community?

A. Well, not directly as you put it, but we all were aware of the gossip and all the rumors and, if you wish, newspaper talk about him, unfavorable opinions that people had of him, and so we who knew him thoroughly could not help but express our own opinions about those things.

Q. Father Meinecke, based upon your own acquaintanceship with Harry Bridges and based also upon such words or utterances of other people which have come to your ears, are you in a position to tell us what the reputation of Harry Bridges is for truth, honesty and integrity?

A. I give you my personal opinion. I would say it is of the best. In all of his associations with me personally as a priest, he not only was truthful, honest and an upright man, he was more.

Q. Thank you very much.

A. As a priest—I beg your pardon—as a priest, you know, I do not say that I am as smart as most people, but you should give each priest a little credit for shrewdness, a little judgment of character, and

(Testimony of Father Paul Meinecke.)

you know that I would not associate myself publicly and be known here in the city by many thousands of people as a very good friend of Harry Bridges if I had the slightest doubt about his character. See?

Mr. MacInnis: Thank you. [4771]

Cross-Examination

By Mr. Donohue:

Q. Did I understand you to say, Father, that Mr. Bridges is a Catholic or was a Catholic?

A. Is a Catholic.

Q. Do you know as a matter of fact that Mr. Bridges has married a second time with a first wife surviving?

A. Many Catholics do that.

Q. Do you know whether Mr. Bridges was married by a Catholic priest and in the Catholic church?

A. I am not aware that he was, but I can tell you that if the circumstances are as you say his second marriage could not have been performed by a priest unless the first one was investigated by his bishop and declared to be invalid. Then he may marry again and a priest may perform the ceremony.

Q. If he were not married a second time by a priest, would you say that he was still a Roman Catholic?

A. That is one thing that you cannot erase.

Q. What is the one thing you cannot erase?

A. When a man is baptized a Catholic, he is a Catholic forever, whether he works at it, whether

(Testimony of Father Paul Meinecke.)

he is faithful to his religious obligations constantly, or if he drops them for a while. If he wants to come back, he does not have to be baptized a Catholic again. He is always a Catholic, and while there is life there is hope.

Q. Do you know of your own knowledge whether Harry Bridges is [4772] what you understand by the term a practicing Catholic?

A. No, I would not consider Harry Bridges a practical Catholic.

Q. During the time that you knew Harry Bridges did you know him to attend regularly the obligations of the Catholic church, to attend mass on Sundays and holy days of obligation?

A. Mr. Donohue, that was part of my business, and our association to work towards that end.

Q. Did he answer just as I do towards many people who are not as practical as they ought to be? Did Mr. Bridges?

A. He did not belong to our parish. Neither did he live in our neighborhood. Therefore I could not give you—I wouldn't know.

Q. In your close personal friendship for Harry Bridges over a good many years and in the very numerous instances when you discussed, as you said to Mr. MacInnis, religious matters with him, did you discuss with him the salvation of his own soul?

A. As I said before, that was a big piece of our association and that subject came up many times.

Q. Are you not in a position to tell us whether or not during the years that you knew Harry

(Testimony of Father Paul Meinecke.)

Bridges he was a practicing Catholic and participating in the sacraments of the Catholic church?

A. My talks with him were not as successful as I wish they might have been, but I said before, while there is life there is [4773] hope.

Q. Isn't it a fact, Father, what you are saying is Harry Bridges was a Catholic, and there is still hope that he might again become a Catholic?

A. He can't become a Catholic again. He could become a practical Catholic but he is a Catholic. I know that he comes from a Catholic family.

Q. Isn't that the reason for your stating that he is a Catholic because he came from a Catholic family?

A. Would you rephrase that, please?

Q. Isn't that the reason that you now state that Harry Bridges is a Catholic because you know he came from a Catholic family?

A. No, I know he is a Catholic on his own. Whether his mother and father were or were not would have no bearing on it. My own father and mother are not Catholics, but I am.

Q. You also know he is not a practical Catholic, do you not, Father.

A. I know that.

Q. In the organization of the Catholic Trade union movement, did you come in contact at all or have any experience with the fact that the trade union movement in this area as well as in other areas had been infiltrated by the Communist Party?

A. All the more reason for us to get interested in it.

(Testimony of Father Paul Meinecke.)

Q. Would you answer the question, Father: Did you find that to be a fact. [4774]

A. Just like in any other organization like a trade union, you will find all sorts of people.

Q. Would you still answer the question, Father: Did you find any infiltration by the Communist Party in the trade union movement in this area?

A. Yes.

Q. And as a priest of the Catholic church, did that cause you any concern.

A. It certainly did. It made me more interested in the trade union movement and aware of our obligations to get to help those people.

Q. Help what people?

A. People who were in the unions, show them that we priests have an interest in their problems.

Q. Did you ever discuss with Harry Bridges the question of the infiltration of the Communist Party into the trade union movement.

A. Not that I specifically remember. It may have come up, but it slips my memory now as a subject of conversation.

Q. Among the many rumors and bits of gossip that you stated you'd heard about Harry Bridges, were any of those bits of information with respect to the question as to whether or not Harry Bridges was a member of the Communist Party?

A. Look, Mr. Donohue—

Q. Could you answer the question, Father?

A. I made it my business to investigate that very thing.

(Testimony of Father Paul Meinecke.)

Q. Tell us the result of your investigation, Father.

A. I will. Over the period of years I knew the man and I discussed many, many things with him over periods of hours, I made it my business as a priest to find out what kind of ideas were in his head, what sort of philosophy he was dominated by, his own principles. And give me credit enough for being enough of a judge of human character and human nature that I could plant discussions on him. I could put in questions so that even though he did not give me a direct answer, I could read between the lines.

Now, this is not once. This is over a period of years, because I was aware of all the rumors about the man and the gossip. People would ask me, they would say, "Father you know Harry Bridges. What do you think?"

And I will tell you what I always told them: "I know the man. I know his ideas. There is a great distinction, although some people are not aware of it, between militant trade unionism and Communism. There is a great difference." And I would say that Harry Bridges is, was during those years that I knew him, a militant trade unionist and a great leader, because when he comes up for election in his union, he could get dumped but they always revoted him in. He got reelected.

But going back to that question——

Q. Will you answer it? [4776]

(Testimony of Father Paul Meinecke.)

A. I know it is important, but from all my conversation with him, all the times we discussed the subject, I always went home with the idea, "They are all wrong. Harry is no Communist. Harry is not a radical. He is a militant trade unionist, but he is not a Communist." I can recognize Communism.

Q. Can you tell a Communist when you see him, Father?

A. I certainly—not by seeing him, no, but give me the man and let me talk with him, not for an hour, but over a long period of time, to meet him again under different circumstances, and I can point out a Communist to you. It is ideas in their head which will come out in their conversation and if he were a Communist——

Q. Father——

A. I beg your pardon—if he were a Communist, he would have slipped at least once or twice and said something that would convince me the man is a Communist. But he never slipped. He never defended the thing. He never gave out with any ideas that would lead me to believe that he is a Communist. And I tell you that very sincerely.

Mr. Donohue, as a Catholic priest, if I had the slightest notion that Harry Bridges was a Communist, I would not be here. If I had any suspicion whatsoever that he was, I would not be sitting here as his friend.

Q. Now, will you answer my question?

A. Will you rephrase it? Pardon me for being so windy. [4777]

(Testimony of Father Paul Meinecke.)

Q. I asked you, Father, whether or not among the items of gossip and rumor which you stated to Mr. MacInnis came to your attention about Harry Bridges, was there any part of that concerned with the fact that he was a member of the Communist Party?

Mr. MacInnis: That is a different question altogether, your Honor.

The Witness: That is rather involved.

Q. (By Mr. Donohue): Let me put it a little simpler to you, Father: Did you ever hear anyone say that Harry Bridges was a Communist?

A. Loads of people say that, victims of gossip, people who repeat things they do not know about, and they just repeat and repeat. Surely, I have heard people say that Harry Bridges was a Communist.

Q. And you say loads of that character?

A. Yes, lots of people said that.

Q. How many people have you heard say he was a man of honesty, veracity and integrity?

A. You do not say that thing about a person.

Q. Let me ask you, did you ever hear anyone say he was a man of honesty, veracity and integrity?

A. That is not fair.

Q. Will you answer the question, Father?

A. You are involving me in something that can be twisted against [4778] a man, something I do not intend to do.

Q. Do you understand, Father, that you are here to testify not as to your personal opinion as to Harry Bridges but as to his reputation in the com-

(Testimony of Father Paul Meinecke.)

munity for truth, veracity, honesty and integrity?

A. By the very fact, Mr. Donohue, that no one among the people who knew him impugned his veracity or spoke against his uprightness, then I will answer your question and say, certainly, people said good things about him on that score. By the fact that they did not attack those qualities in his character, they did not impugn him.

Q. I ask you again the direct question, Father: Did you ever hear anyone say in your presence that Harry Bridges was a man of honesty, integrity, truth and veracity?

A. As you put it, like the lines out of a play, of course not. Who is going out of his way to make a statement like that? My bishop has probably never heard anyone say those things about me just that way.

Q. Then it is a fact, Father, you never heard anyone say that Harry Bridges was a man of truth, honesty, veracity and integrity, correct?

A. In those very words I have to say yes, but that is not a fair question. No one said that about me either. Those qualities are assumed until someone attacks them.

Q. And your testimony is based upon that assumption except for [4779] your own personal experience?

A. Maybe I am dumb. Will you do that over again, please?

Q. Is your testimony based upon that assump-

(Testimony of Father Paul Meinecke.)

tion of negative testimony except for your personal experience with the defendant Harry Bridges?

A. No, there is lots of positive in it, too.

Q. Would you tell us the positive that you heard from some other person other than yourself?

A. You are asking me to remember conversations that go back five, ten, fifteen years. What man can do that?

Q. I am only asking you, Father, if you are able to tell me if any person or persons ever discussed with you the reputation of Harry Bridges and said he was a man of truth, honesty, veracity and integrity?

A. If you boil those three things down, those three qualities, boil them down to one element, then I would say that we who knew him always came to the conclusion that he had those qualities.

Q. Father, are you naive enough to believe that a member of the Communist Party would tell you that he was a member of the Communist Party?

A. Some did. I knew Communists who boasted about it.

Q. Are you naive enough to believe that Harry Bridges, who has denied his association and membership in the Communist Party on every possible occasion, would tell you if he were a member of the Communist Party? [4780]

A. If he told me he were not and yet he were a Communist, out of all of our associations I would have found out about it. And you would say, "Why?" By reading between the lines.

(Testimony of Father Paul Meinecke.)

Q. Father, you are a priest and not a psychiatrist, are you not?

A. Every priest is a fairly good psychiatrist.

Mr. Donohue: If your Honor please, at this time I move to strike the testimony of the witness on the ground that he has testified only as to his personal opinion of the defendant Harry Bridges, which negatives the possibility that his testimony may stand as to the reputation of the defendant Harry Bridges because, despite what may be the rule in *People v. Adams*, which I think Mr. MacInnis cited one day——

The Court: 1902.

Mr. Donohue: ——the rule in the Federal Court is well established that a general reputation for good character is a factor which a jury is entitled to consider among other bits of evidence in arriving at a determination of the guilt or innocence of an accused—a general reputation for good character. A man's character, as I understand all of the decisions, is what in fact he is. His reputation is the estimation of that man's character in the community in which he lives or works.

I most respectfully therefore, say to your Honor that this witness has voiced nothing other than a personal opinion and has in fact negated by his own testimony any possibility that the opinion which he is citing here in a statement of the reputation of Mr. Bridges, but is positive in that it is his own personal opinion. And for that reason I most respectfully urge your Honor to strike his testimony from

(Testimony of Father Paul Meinecke.)

the record. And if there be any doubt as to the accuracy of my statement, I shall be glad to submit a memorandum to your Honor. [4781]

Mr. MacInnis: Now, the only striking thing about the remarks of the special prosecutor is that they are not so, because this witness, prodded by the special prosecutor, said that he had not only negative evidence of the character of Harry Bridges but positive evidence. He said that the precise words "truth, honesty and integrity" were not used in that stilted language, but many people who discussed the matter with him came to the same conclusion as himself. And that is the only test that the law imposes, that the opinion given by a witness be a composite of his own knowledge and acquaintance with the person involved plus such discussions as may have come to his ears from members of the community in which he lived. Now, he said that, your Honor; he has said it three or four times, and because he has expressed a personal opinion due to the cross-examination, his testimony becomes stronger, not weaker, for that reason, and there is no possible ground upon which this testimony should be stricken.

I will invite your Honor to ask the witness if the answer he gives is not a composite of his own knowledge of the man plus what other people in the community have said.

The Court: Mr. MacInnis, you are counsel for several of the defendants. You may ask him that if you are so advised.

(Testimony of Father Paul Meinecke.)

Mr. MacInnis: Yes.

The Court: It is not the province of a court to examine the witness. You ask the questions, [4782] if you like.

Mr. MacInnis: Yes I will be glad to do that.

Q. Father Meinecke, tell us if it is not a fact that the opinion that you give concerning the good reputation of Harry Bridges for the qualities of truth, honesty and integrity is based upon two things: First, your own knowledge and acquaintanceship with him, and, secondly, such things as you have heard said by other persons in this community.

Mr. Donohue: I object to the question, if your Honor pleases.

A. You are absolutely correct.

Mr. Donohue: Just a minute, Father. I object to the question, if your Honor please, because the law is certain that it is not the individual's opinion which is admissible before a jury as a matter of reputation; it is the general reputation in the community of the particular defendant for the particular virtue which Mr. MacInnis ascribed.

The Court: The so-called trait involved. That is a correct statement of the general principle, no question about it.

Mr. MacInnis: That is right.

The Witness: May I say this: What you gentlemen were arguing about, my personal opinion——

Mr. Paisley: No volunteer statements.

The Witness: It is largely dictated by—what do you call that other thing?—public opinion or the

(Testimony of Father Paul Meinecke.)

opinion of others, their estimation of the man. These people who knew him maybe [4783] better than I did dictated largely my own opinion, and my own experience confirmed that opinion. I did not learn this thing as though I were living in a little watertight compartment. I dealt with other people whose ideas about Harry Bridges I listened to, people who knew him, people whose opinion I could trust, people whom I knew knew what they were talking about. To name names,— of course, I do not wish to involve others, but I remember on many occasions, he was then Senator John Francis Shelley; he was a very good friend of ours. I knew that he knew Bridges and he was a very good friend of mine. Those people always did some wonderful things for me. I never forget what they did for me back in 1940 when I needed a friend.

Q. (By Mr. MacInnis): What was 1940?

A. But these people——

The Court: Mr. MacInnis asked you a question.

Mr. MacInnis: What was 1940, Father?

A. Now, I suppose that is a personal thing. 1940——

Mr. Donohue: Just a minute, please, Father. I think, if your Honor please, that a question should be asked of the witness to develop the only fact or factor which is admissible as a matter of law, and that the good Father should not be permitted to make generous voluntary statements which are not admissible as a matter of law.

(Testimony of Father Paul Meinecke.)

Mr. MacInnis: Judge, I didn't invite the cross-examination. [4784]

Mr. Donohue: This is a court of law and not——

Mr. MacInnis: The special prosecutor may not quell the statements of a witness because he is displeased with them. And he chose to cross-examine the witness and open various avenues——

The Court: Mr. MacInnis, proceed with the question, if you have one.

Q. (By Mr. MacInnis): You said that persons such as Mr. Shelley and Mr. Bridges performed some service for you in 1940. What was that?

Mr. Donohue: I object, if your Honor please. What difference does it make what the service was?

The Court: Is this a matter of personal concern, Father?

The Witness: No, it shows——

The Court: Would you answer the question.

The Witness (continuing): ——the attitude of those men towards me.

The Court: It was a matter of personal concern to you, was it not? Whatever services were performed were of a personal nature?

The Witness: Involving all the members of their unions, yes.

Mr. MacInnis: I think it would be a proper subject, your Honor.

The Court: I will sustain the objection. [4785]

Q. (By Mr. MacInnis): Now, Father Meinecke, the special prosecutor chose to ask you some ques-

(Testimony of Father Paul Meinecke.)

tions about the personal life of Harry Bridges, the fact that he has remarried. Let me ask you this: Has he consulted you as to any steps which he might take in order to validate his second marriage in the eyes of the Catholic Church?

A. Years ago when I was an assistant here as a priest here in San Francisco he did approach me on that very subject.

Q. Now, as a Catholic priest engaged in the work which you have followed, as you say, for twenty years, you are not a friend of Communism, I take it?

A. By no means.

Q. The special prosecutor asked you if you had found any infiltration of Communists into unions in San Francisco, and I take it from your answer that you actually conducted an investigation to that end, is that correct?

A. I made it my business to be well aware of that situation, and how many there were and what they were doing, and who they are and their tactics and their program. I made it my business to know all those things. As many another has expressed this, we want to know what the opposition is doing, so we try to be alert on the subject so that we do not go off half cocked and make gratuitous statements about Communism. We tried to get the facts.

Q. Let me ask you this: If you were not convinced from all of [4786] the bases which you have outlined that Harry Bridges was not and could not have been a Communist, would you have given the

(Testimony of Father Paul Meinecke.)

testimony that you have offered to the Court and jury?

Mr. Donohue: Just a minute. Just a minute. I object to the question. It doesn't make any difference whether he is convinced or not convinced.

The Court: The witness has already testified on that subject.

Mr. MacInnis: Thank you very much.

Q. (By Mr. Donohue): Father, are there trade unions up in Eureka, Nevada, where you are now stationed?

A. Unfortunately, the present policy of Washington is that no mining is to be done in the Western United States. Our mines are closed. There are no jobs. My poor little parishes are suffering. So where there are no mines operating, there are no workers, there are no unions.

Q. I was wondering whether there was any reason, after your ten years' experience with the trade union movement, for your being assigned to an area in which there is no trade union movement at all.

A. A very interesting question. No connection whatsoever, and I forgive you for the slur.

Q. I didn't ask for forgiveness, and I meant no slur. I asked you a question. You understand that this is a court of law. [4787]

A. Yes, sir. My superiors alway gave me loyal backing and approval and urged me to take an interest in the trade union movement and in the problems and knowing these people and being help-

(Testimony of Father Paul Meinecke.)

ful to them. My superiors approved of that fully and gave me full encouragement.

Q. And it was your superiors who moved you to Eureka, Nevada?

A. No, I requested it. The records show that.

Q. Father, did you ever hear in the years that you knew Harry Bridges, Harry Bridges ever make a public utterance in opposition to the Communist Party?

A. That, like your other question——

Q. Did you or did you not, Father?

A. You see, I say “No,” then you draw a conclusion from that. There was no occasion for it.

Q. Father, you are not a lawyer as well as a psychiatrist, are you? Are you, Father?

Mr. MacInnis: I would suggest, your Honor that——

A. No.

Q. (By Mr. Donohue): At the present time?

A. No, Mr. Donohue.

Mr. MacInnis: If you won't do anything, I will. I won't stand for questions like that.

The Court: Mr. MacInnis, there is no impropriety——

Mr. MacInnis: If you won't interfere here——

The Court: Mr. MacInnis, there is no impropriety in the [4788] question addressed to Father Meinecke by Mr. Donohue. Very many priests have graduated from law, distinguished themselves as lawyers. I have in mind Father Raymond Feeley.

Mr. MacInnis: I know of him.

(Testimony of Father Paul Meinecke.)

The Court: A distinguished priest.

Mr. MacInnis: He is the only one I have ever heard of.

The Court: I have in mind others. But it may well be that Father Meinecke pursued a professional career before he espoused the priesthood. That applies to likewise Christian Brothers and the priests.

Mr. MacInnis: I don't think that you think that, Judge.

The Court: It is perfectly proper.

Mr. MacInnis: I don't think that the prosecutor meant it in that light.

The Court: How the prosecutor meant it is probably for the jury and probably for the Court. Whatever inference you may draw, of course you may draw. The question was perfectly proper.

Mr. Donohue, proceed.

Mr. MacInnis: I suggest the prosecutor meant to draw an entirely improper inference from the question.

The Court: That may be your opinion. You are entitled to harbor it.

Q. (By Mr. Donohue): Would you answer the question, Father, as to whether or not during the many years that you knew and [4789] were a close friend of Harry Bridges you ever heard him publicly utter a single word of criticism against the Communist Party?

A. I didn't hear it with my own ears, but I remember one day when—probably a public fact; if the Court will pardon me I will quote the statement.

(Testimony of Father Paul Meinecke.)

May I be forgiven for quoting it directly? I remember being told, "See, see, Harry Bridges is not a Communist."

I said, "What convinced you?"

He said, "Because he told"—I don't know who the name was at the time; he was the head of the Communist Party around in these parts—he said, "Harry Bridges told him to go to hell." And among ourselves we know you can't do that in a disciplined organization of the Communist Party.

Q. Now in the many years that you knew Harry Bridges, Father, you were pretty close to him?

A. Right.

Q. You followed his public carrer, right?

A. Right.

Q. Is that the only incident that you can tell us in which Harry Bridges in the countless thousands of public speeches and public utterances, has ever uttered a single word critical of the Communist Party?

A. Because in his speeches at unions that I attended where I listened to him, he was being positive; he had his mind on [4790] his business; he was not taking in extraneous subjects; he was talking about the business at issue,—the cause of the strike or the problem before the men.

Q. In his countless thousands of public utterances over the years you have known him, Father, did you ever hear him utter a single word critical of the Soviet Government?

(Testimony of Father Paul Meinecke.)

A. If I had more time to refresh my memory I might be able to dig up some. Tonight I will probably think of five answers to that question, but right now nothing is fresh in my memory.

Q. In your attempt to eradicate Communism from the trade union movement in this area, if you made such an attempt, what part did Harry Bridges play in the effort?

A. He always gave me his good will. If he were for it, he would have discouraged me, he would have thrown cold water on my efforts.

Q. Did you ever hear him make a speech in your behalf before a labor union or before the public of this area in which he urged his audience to eliminate Communists from the union?

A. They were not as great a problem as some people think in those days. The fact that we knew who they were and how they operated—men like Mr. Bridges could nullify their efforts.

Q. Did you ever hear Mr. Bridges make a statement to his union urging his union to expel the Communists from his union?

A. I don't think that is possible. If you knew how unions operate, you would know that is not possible. If you were an [4791] employer and had 15 people working for you in a shop and his agent came in and organized them, got them into a union, say you had two Communists working for you among those 15 workers. They are blanketed into the union. The blame is upon the employer for hiring two Communists. What is the union going to do?

(Testimony of Father Paul Meinecke.)

It wants to make union people there out of your place who are hiring the Communists.

Q. Father, it may be a difficult task, but it isn't impossible——

A. What would you do as an employer?

Q. Each will share his part of the blame.

A. What would you do as an employer?

Mr. Donohue: I have no further questions of the witness.

Mr. MacInnis: Thank you very much. Shall we take the recess?

The Court: One question, Father Meinecke.

Q. Did you receive a subpoena to attend this court?

A. That is the reason I am here, your Honor. A subpoena was served on me over in Eureka, Nevada, and I consulted with people who are my superiors what I should do about it, and they told me, "Obey."

Q. Did you arrive here today, Father, this morning.

A. I came in yesterday.

Q. Have you had any discussions before taking your place on the witness stand with any persons?

A. Yes, I spoke to Mr. MacInnis. [4792]

Q. At his office?

A. Not at his office; at his home.

Q. At his home. When did you meet at his home, Father?

A. Last evening.

Q. Did you have dinner there at his home?

A. That is correct, your Excellency — your Honor——

(Testimony of Father Paul Meinecke.)

The Court: Thank you very much.

The Witness: I thought you were my Bishop.

The Court: You are rather complimentary. After you spent the evening there and enjoyed the social activities, then you had a discussion concerning the testimony that might be given in this case?

A. That is right. I asked that my memory be refreshed; I very rarely see a newspaper.

Q. May I ask you, Father, to what extent did you ask Mr. MacInnis to refresh your memory or recollection?

A. To tell me how the case has been going up to the present time——

Q. He no doubt told you the case was going all right for the defendants, did he?

Mr. MacInnis: I thank your Honor for his thoughtfulness.

The Witness: His general tone was optimistic.

The Court: Just a moment.

The Witness: His general tone was optimistic.

The Court: Now, to what other extent did your memory [4793] become refreshed by your conversation with Mr. MacInnis?

A. I was trying—I know that questions would be asked me and I wanted to try to be direct and factual and to the point and not hedge. So the first thing we had to agree on was what year I first got to know Harry Bridges, and then——

Q. Do you have difficulty, Father, with your memory or recollection under ordinary conditions?

A. In Nevada there are no clocks and no calen-

(Testimony of Father Paul Meinecke.)

dars. We don't know one day from another, and it is easy for one to become careless about pegging dates, although I wasn't that way when I was here in San Francisco.

Q. In San Francisco, Father, you were perfectly conversant and well oriented, weren't you, with respect to dates and the like?

A. That's right.

Q. Since you went to Nevada your orientation has become poor, has it?

A. No; the years have sort of run together. I say a couple of years ago, and then I remember back, it was 15 years ago.

Q. Have you been recently subjected to medical treatment, Father?

Mr. Hallinan: If the Court please, I am going to object to these questions.

Mr. MacInnis: Let me in.

Mr. Hallinan: I want to enter a legal objection. Your [4794] Honor has seen the Manning Johnsons, the Crouches, the Rosses and everybody get on that stand and we asked whether they were insane or not. I object to your Honor's question. I object to that last question and assign that as misconduct, and I ask that the jury be instructed to ignore the implication of the question.

The Court: There is no occasion for any admonition to the jury. Mr. MacInnis invited it.

Mr. MacInnis: I never heard of such a question.

The Court: Mr. MacInnis invited me to ask the question.

(Testimony of Father Paul Meinecke.)

Mr. MacInnis: Your Honor refused to do that and I asked a question.

The Court: I have the greatest respect for men of the cloth, as we all have.

Mr. MacInnis: You are demonstrating it.

The Court: There is no impropriety in my questioning.

Mr. MacInnis: I say there is.

The Court: He asserted his present memory is not good. I asked him whether or not his recollection was good while he was here years ago. He said yes, it was good years ago. I don't see any reason for the criticism.

Mr. MacInnis: When one of the prosecution witnesses was on the stand we asked him if he had received medical treatment, and now you ask a priest who comes here and gives testimony the same question. [4795]

The Court: Ladies and gentlemen——

Mr. MacInnis: I think you should cite yourself for misconduct.

The Court: Ladies and gentlemen——

Mr. MacInnis: I have never heard anything like that. You ought to be ashamed of yourself.

Mr. Donohue: If your Honor please, could I ask your Honor to recess at this time and ask the Father to remain until after the recess period?

The Court: Ladies and gentlemen of the jury, I say to you at this stage of the case that the questions that I asked were asked in perfect propriety. Any question I addressed to the priest was born as

(Testimony of Father Paul Meinecke.)

a result of the examination conducted on direct and cross-examination. Mr. MacInnis invited me to query the priest. At that juncture I refrained from interrogating him.

I say to you that the respect I have for the priest or any priest or any man of the cloth, be he Catholic, Protestant or any other faith or denomination, is not to be reflected upon by anything I asked this man. A witness coming into a court of law, ladies and gentlemen, subjects himself or herself to cross-examination, and when a person responds to direct questions, that person in the course of events is to be and should be subjected to cross-examination. I believe that the questions presented by Mr. Donohue to this priest were dignified [4796] and proper. I think that the questions I asked the priest were dignified and proper.

Now we will take a recess.

Mr. Hallinan: May I make a motion before you do? I move for a mistrial upon the misconduct of the Court in the type of questions addressed to this priest as tending to reflect—the jury could arrive at some conclusion that it was a reflection upon the credibility of Father Paul.

The Court: The motion——

Mr. Hallinan: And we move for a mistrial upon the ground that your Honor's questions were improper and tend to prejudice these defendants by causing some shadow and some reflection to be cast upon a witness who has merely obeyed a subpoena to come in and give his opinion.

(Testimony of Father Paul Meinecke.)

The Court: The motion is denied. In fact, I developed the situation that the witness was subpoenaed. It was my first question, Mr. Hallinan.

The motion for a mistrial is denied.

We will take the recess.

Father, do you mind remaining for a few minutes?

The Witness: No, certainly not.

The Court: You may come into my chambers if you wish, or make yourself perfectly at home.

The Witness: Thank you.

The Court: Be careful going down the [4797] stairs.

(Thereupon the jury retired from the courtroom.)

The Court: Do you have some matters, Mr. Donohue?

Mr. Donohue: No, your Honor. I simply asked your Honor to ask the Father to remain a few minutes. You have already done that.

The Court: Father Meinecke, would you mind remaining a few minutes?

The Witness: I beg your pardon?

The Court: May I ask you to remain for a few minutes?

The Witness: Certainly.

The Court: We will take the recess.

(Recess.) [4798]

Mr. Donohue: If your Honor pleases, at this

time I would ask your Honor to ask Father Meinecke if he may not remain over until tomorrow morning.

Mr. MacInnis: What is the purpose? If there is some legitimate purpose, we have no objection and we couldn't have, but if the counsel will state the purpose, as we so often have been required to do——

The Court: Mr. MacInnis, I appreciate your comment. If Mr. Donohue is prepared to disclose the purpose——

Mr. Donohue: Yes, your Honor. I wish to read the transcript of the Father's testimony before further cross-examination is had.

Mr. MacInnis: We have no legal objection. If he can do that by 2:00 o'clock today, it would be better. I assume that it would be within your Honor's discretion to ask Father Meinecke to remain, and we will not object to it if you think it is proper.

The Court: Thank you. Ladies and gentlemen of the jury, I have one brief statement to make to you in the light of a possible misconception on the part of the Court, at least on the part of counsel and the Court addressing questions to witnesses. I have not had an opportunity to examine the transcript. There was considerable discussion at or about the time that I addressed several questions to the Father. I said to you then, and I repeat now, that the questions that I addressed to Father [4799] Meinecke were, I believe, pursuant to the inquiry at hand. Only in passing I think the first question

I asked him was whether or not he was subpoenaed. That was overlooked. I think in fairness to Father Meinecke it was a question that should have been asked, showing his purpose in coming here.

As I indicated to you at the outset of this case, and as I repeat constantly, and as I will have occasion to tell you at the conclusion of this case, the question of the credibility of witnesses, their reasons or motives in testifying, all and singular, the factual issues remain with you and are for you in their ultimate determination. I have no province—ordinarily not, I say—in the determination of the factual background or consideration of this case. Any conversations I have had with counsel on either side, prosecution or defense, or any colloquy that we may have had, may not be regarded by you as reflecting the Court's view upon this matter at all, nor as reflecting upon either Mr. Schmidt now on the stand, Mr. Robertson or Mr. Bridges. Any discussions with counsel in your presence or out of your presence, if they have been brought to your attention, are not to prejudice you in any manner concerning the guilt or innocence of these men on trial. It is my sworn duty, and it is your sworn duty, to provide the defendants on trial with a fair and impartial trial. Likewise under our oath it is our sworn duty to accord the prosecution, the Government of the United States, a fair trial. [4800]

Latterly, in my examination of Father Meinecke some mention was made by counsel concerning the asserted impropriety of a question on my part to the Father. I might say to you that that was not

born of any desire on my part, nor was it designed to inquire into Father Meinecke's mental processes. Nor was it to reflect upon his integrity. The question was born and conceived out of a desire on my part to accord fairness to the witness, for the reason that mention was made during the course of this testimony that he left San Francisco for Nevada; an inference might be drawn from that departure that it had something to do with activities in trade unionism and the like. The Father on the witness stand volunteered that he asked to be transferred. I merely wanted to inquire, ladies and gentlemen, a very simple question, not born of curiosity on my part, but born of a desire to provide you with all the facts surrounding the Father, and it was to the end that I might inquire as to his health. Very many people have to leave large metropolitan areas to go to less burdensome parishes and that was the reason underlying my question.

Now, you may proceed, counsel.

Mr. MacInnis: Before I proceed, I want the record to show an objection to those portions of your last remarks which are offered in explanation of the questions posed to the witness, Father Paul Meinecke, upon the ground that your remarks are self-serving, gratuitous, and have the total effect of adding injury [4801] to injury. I think we obviously have no position in this case to offer in argument in rebuttal of your Honor's remark, but I suggest that the explanatory remarks are at least partially as improper as the ones originally made, and I want to object to those remarks remaining

in the record.

The Court: The objection is overruled. [4802]

February 2, 1950—10:00 a.m.

The Clerk: The United States of America v. Harry Renton Bridges, Henry Schmidt and J. R. Robertson, on trial.

Mr. MacInnis: Call Father Paul Meinecke again, please.

I understood that the special prosecutor wanted to investigate Father Meinecke and thus had him held over until today. So if there are some questions, he is now available.

Mr. Donohue: The special prosecutor made no such statement, that he wanted to investigate Father Meinecke. He said he would like to read the transcript of testimony and ask him some more questions.

The Clerk: The witness on the stand is Father Paul Meinecke, heretofore sworn.

FATHER PAUL MEINECKE

recalled.

Cross-Examination (Continued)

By Mr. Donohue:

Q. Father, during the period that you were here in San Francisco you were a member of the Franciscan Order of the Catholic Church?

A. You are absolutely correct, sir.

(Testimony of Father Paul Meinecke.)

Q. Are you still a member of that order, Father?

A. No, sir.

Q. And at the time, Father, when you left San Francisco after ten years in the Franciscan Order here, in which, as you stated, [4873] you devoted much of your time to the problems of labor, was the decision to leave San Francisco fully voluntary on your part?

A. It is true there seems to be an apparent contradiction there between what I said yesterday and what you are bringing out now. If you will pardon me a moment, you see, every priest takes a vow of obedience, and he must be like a soldier ready to go and come for any assignment. I had been working, as you say, here in San Francisco about ten years in the same parish in those activities you refer to, and my superior saw fit to use my services in another parish in Spokane, Washington. But during the years that I was working here in San Francisco, maybe for five or six years, I had the good fortune to be appointed as the chaplain of the San Francisco recreation camp in the high Sierras. There I discovered that I had a great yen for the wide open places, for mountains and valleys where there aren't too many people; and when I was up in Spokane, corresponding with some other priests who had volunteered for the Nevada missions, I likewise conceived the idea, and through proper channels, through my superiors and through the Bishop and finally with the approval of the Holy Father himself, I was allowed to volunteer for the Nevada mis-

(Testimony of Father Paul Meinecke.)

sion where I am now engaged in priestly work.

Q. And that, Father, was while you were in Spokane, not while you were here in San Francisco?

A. That is correct. [4874]

Q. Was your leaving San Francisco and going to Spokane under orders of your order, or was it a voluntary request on your part?

A. At that time it was—it falls into the first category; it was obeying an order, as every one of us priests must do.

Q. Father, yesterday when you said that Harry Bridges was not a member of “our parish,” referring to St. Boniface, you didn’t to give the impression that he was to your knowledge a member of any other Catholic parish of this city or diocese?

A. He would automatically be a member of the parish within whose confines or parish limits that he lived.

Q. Do you know of your own knowledge whether he is an active member of any Catholic church in the City of San Francisco?

A. To the best of my knowledge, I would not be able to answer that question in the affirmative.

Q. When you talked with Mr. Bridges, Father, about the possibility of his coming back into the Church as a practical Catholic, when was that, approximately?

A. I beg your pardon?

Q. When was it?

A. On many occasions.

Q. When was the——

A. That was a great part of the motive of my association with Mr. Bridges; I had that hope.

(Testimony of Father Paul Meinecke.)

Q. Did he talk with you on that subject on many occasions? [4875]

A. That is correct.

Q. What is your best recollection, Father, as to when the last occasion when you discussed that subject with him occurred?

A. I could not say that exactly, but I would say that out of three—out of three times that we would meet, on at least one of them I would bring the subject up and I would tell Mr. Bridges how much it would—oh, it would redound to his influence. I thought it would be a great help to him to be a practical Catholic and also a great labor leader; that his influence would be all the greater.

Q. Do you recall with respect to his personal circumstances at the time when you last talked to him whether he was then married to the same wife with perhaps whom you may have talked yourself at one time or another?

A. Yes, I knew her and I spoke to her, and at that time he was married to her.

Q. Have you talked with him at all or has he discussed with you at all the subject of the possibility of becoming again a practical Catholic, if he ever was one?

A. I think I had him right on the edge a couple of times ready to push him over.

Q. Was that, Father, before he had taken a second wife after having divorced the first?

A. That is correct.

Q. Is there some rule in the Catholic Church

(Testimony of Father Paul Meinecke.)

whereby one [4876] becomes excommunicated for having married a second time with a living spouse by the first marriage?

A. No, the penalty is not excommunication.

Q. Is there a penalty of excommunication for a Catholic who fails to carry out his Easter duty?

A. Not any more.

Q. Then you still consider Harry Bridges a Catholic?

A. Yes. Once baptised, as I said, sir, he will always be a Catholic. He can never erase that fact. A person may wander a bit, may forget about their religion, fail to practice it for many years of their lives, as many people do, but when they return to the Church the only thing they have to do, they go to confession, say, "Father, I have been away for twenty years; I want to get myself lined up again," and the priest merely hears his confession, gives him absolution, the man is in good standing with the Church again. [4877]

Q. You were here, Father, from 1938 through 1947?

A. Approximately.

Q. And I take it that during the period of your activity with the Association of Catholic Trade Unions that you sought to warn the members of your organization of the dangers of infiltration in the labor movement of members of the Communist Party, did you not?

A. That is one of the very purposes of the organization, to make the members aware of that.

Q. In consequence of that type of instruction,

(Testimony of Father Paul Meinecke.)

Father, I take it that you yourself familiarized yourself in some measure or in some degree with the principles of the Communist Party?

A. I believe I made more than an ordinarily thorough study of the subject. If you will pardon me for going back a few years, I believe as early as 1934 you would have seen me in Union Square in New York or on the Common in Boston on a soapbox talking and arguing with Communists. In fact, I would interject myself into the arguments of some other soapbox orators and heckle them until such time that the Communist or worker or all sorts of Communists and Socialists would finally in extreme exasperation say,—well, they would use a little rough language. If I may be pardoned, they would usually say, “If you know so damn much about it, why don’t you come up here?”, and I was waiting for such an opportunity, and I used those opportunities.

Meanwhile, at home I studied and I discussed Communism in a [4878] practical way with Communists and with Socialists and every variety of radical, so that I would not only have that book knowledge, but likewise I would see how it was interpreted by the man in the street who posed or thought he was a Communist. And when I came west, I did not have the opportunities that I had on the East Coast, but I began to familiarize myself with the scene of Communism as it worked in San Francisco, tried to meet the man who was a Communist, the men who were Communists, talk to them,

(Testimony of Father Paul Meinecke.)

read about them, and of course at the same time I was working with my own group. Especially I was working with a group of young people who were called the Young Christian Workers. One of the main purposes of that organization was to combat Communism positively. We did not fight Communism in the negative; in other words, always preaching against it. We tried to teach the positive principles of the good trade unionism. We figured we would be wasting our time if we were always walloping Communism. We had a program, a very positive program of our own, which we wished to sell and which we devoted most of our time to, being positive, not negative.

Q. Then I take it, Father, that because of your familiarity with the Communist doctrine, that you carefully examined the manifestations of the Communist Party by way of their propaganda in the United States during the period of time in which you were here in San Francisco?

A. You are absolutely right. I watched it like a hawk. [4879]

Q. Taking you back, then, Father, to August of 1939, at the time when Russia and the Nazis signed their famous peace pact and became allies and then proceeded to divide Poland between them, each taking substantially a half, do you recall that at or about that time the Communist Party propaganda in the United States was one which called the war in Europe an "imperialistic" war and one which opposed any aid on the part of the

(Testimony of Father Paul Meinecke.)

United States to either England or France, to aid them in their fight against Hitlerism? Do you recall that that was the Communist Party line in 1939?

A. Yes, that is when the Communist Party did one of their seasonal flip-flops, and we all had a good laugh at them.

Q. And do you recall that at or about the same time it was the propaganda line of the Communist Party in the United States to oppose the lease-lend bill, to oppose the draft act, and to propagandize that now famous statement, "The Yanks are not coming."?

A. That was part of their program at that time, as far as I remember now.

Q. Now, was the fact that at the same time Harry Bridges urged and argued the same propositions as were argued by the Communist Party at all significant to you in forming your estimation of the character of Harry Bridges or his membership or non-membership in the Communist Party?

Mr. MacInnis: Pardon me just a minute. Now, that question [4880] assumes facts not in evidence. The facts as stated by the special prosecutor are not true in the first instance. Harry Bridges did not advocate those policies, and the question put to this witness is an unfair one, telling him in advance that these things are true and then asking him to give an opinion.

Mr. Donohue: I will withdraw the question and ask another one, if Your Honor please.

Q. Do you know, as a good friend of Harry

(Testimony of Father Paul Meinecke.)

Bridges and one who, as you say, was familiar with this Communist line in the United States at that time, whether or not Harry Bridges advocated the same principles we have just discussed?

A. I beg your pardon? I hope I did not misunderstand you. Do you mean to say that Harry Bridges was familiar with all those things?

Q. I am asking you now, Father, if you do not know——

A. Or am I familiar?

Q. I beg your pardon. May I ask you, Father, as a matter of fact, do you know whether or not during this same period of time Harry Bridges also advocated or opposed, let me say, lend-lease, opposed the draft act, was in favor of the principle that the “Yanks are not coming,” and designated the then war between the allies in Europe and Hitler as an imperialistic war?

A. Well, that is a pretty big bundle, but I would say definitely I do not know whether he was for or against those things, [4881] because to the best of my recollection now, I do not recall having a conversation with him on any one of those subjects.

Q. Is this during the period of time, Father, when you were forming your estimation by reading between the lines as to whether or not Harry Bridges was a Communist?

A. That's right.

Q. But you did not ask him his views on these matters which at that time seemed to have assumed a great proportion in this country?

A. I think I can truthfully say that I had my

(Testimony of Father Paul Meinecke.)

mind pretty well formed about Harry Bridges' stand on Communism before those events came up.

Q. That is, before 1939?

A. But what he may have done during this time, I could not say now. Maybe through your ability to investigate those things, you could tell me. But I do not know.

Q. Then let me ask you, Father, if you were assured, as a matter of fact, or if you knew as a matter of fact, during that period of time that Harry Bridges did advocate those things which were also advocated by the Communist Party, would your opinion as to his membership or non-membership in the Communist Party be subject to review?

Mr. MacInnis: Pardon me. We in this case are not prepared to accept the assurances of the special prosecutor as to this fact or any other fact, and hence we object to the question as [4882] stating facts not in evidence.

Mr. Donohue: I haven't made any assurance. I asked him if he were assured.

The Court: This is cross-examination; I will allow it.

A. If I were assured, you know what I would do?

Q. I am interested, Father.

A. I would go look up Harry and find his motivation and say, "Why?", because there are many other people in the country whom we know were not and are not Communists but who followed various

(Testimony of Father Paul Meinecke.)

points of that program as you outlined it. Some very outstanding men, but not Communists.

Q. Father, do you recall that there came a time in 1941 when the peace pact between Nazi Germany and the Soviet government was interrupted by an attack in June, 1941, by Hitler upon Russia?

A. Yes, sir.

Q. And do you recall from your familiarity with the doctrine and operation of the Communist Party that the Communist Party in the United States immediately then changed the term from an "imperialistic" war to a "people's war"?

A. That's right; they did another flip-flop.

Q. Now, do you know whether or not at the same time and simultaneously therewith Harry Bridges did a flip-flop, as you have termed it?

A. Hmm. Another one of those subjects we did not discuss. [4883]

Q. Father——

A. You see, look, please—if I may say this?

Q. Surely.

A. In our association I told you before that we were positive. We wasted little time on these other issues. If I went to see Harry Bridges, it was about something, a problem in trade unionism or something that came up in my group and I needed a little help, or it was something about a job for someone, or it was something about a certain member of his union who may have got into a little scrape with the union officials and appealed to me, and would I present the facts to Mr. Bridges, you see.

(Testimony of Father Paul Meinecke.)

Q. Yes. Father, as a matter of fact, were you lulled into a false sense of security on Mr. Bridges' relationship with the Communist party by the mere fact that he talked to you at some time or other about the possibilities of his returning to the fold as a practical Catholic? A. No, sir.

Q. As a matter of fact, he never did anything about returning to the fold as a practical Catholic, did he, Father?

A. Yes, he took some very important steps.

Q. You don't mean that his second marriage was a very important step in that direction, do you, Father? A. I did not say that.

Q. Then what steps do you have in mind, Father?

A. By his close association with me, if I may say so, by his [4884] continuation of that friendship and that helpful attitude toward me, that deferential and respectful way of treating a priest, I saw that we were making progress.

Q. Don't you know, Father, that many persons who are not of our faith are very deferential to Catholic priests and to all men of the clergy?

A. I think that if their motivation is not unworthy——

Mr. Hallinan: I think this discussion, Your Honor, of theological and ecclesiastical matters ought to stop, and I do say, after an experience in the court yesterday, that persons of a non-Catholic faith seem to have more respect for certain

(Testimony of Father Paul Meinecke.)

priests, at least, than some members of the Catholic faith. But it seems to me that this inquiry into Mr. Bridges' ecclesiastical beliefs is going a little bit too far. If counsel is just trying to show off what he professes to know about it, why, he can do it in some other form; but doesn't it seem to you that we have about enough inquiry into whether Mr. Bridges goes to confession or does not, and what his activities are in that behalf?

Mr. Donohue: May I proceed, Your Honor?

The Court: I might say, in response, Mr. Hallinan, that I believe the cross-examination now is within proper bounds.

Mr. Hallinan: I concede, but in the meantime I want to make the objection, Your Honor. I want to point out that little suggestion, backing up counsel's statement about non-Catholics [4885] frequently having more respect for the priest than Catholics show.

Q. (By Mr. Donohue): Father——

A. Yes, sir?

Q. Do you recall that immediately after the conclusion of the last World War that the Communist Party in the United States began to demand the immediate withdrawal of American troops from China and Korea, so as not to deter the so-called "valiant" Chinese Reds from taking over all of China?

A. I remember reading that fact, reported in the newspapers.

(Testimony of Father Paul Meinecke.)

Q. Do you know, Father, from your close contact with Harry Bridges whether he too advocated the immediate withdrawal of American troops from China?

A. You see, that would be another one of those subjects that we wouldn't discuss unless I made a deliberate point to do it. And right now I have to tell you that I do not remember asking Harry, "How do you stand on that?"

Q. And do you remember, Father, that when the Marshall plan was developed in this country, and for the purposes with which we are all familiar, that that, too, was bitterly opposed by the Communist Party in the United States?

A. I remember reading about that in the paper, too.

Q. And do you remember, Father, whether, or do you know whether or not as a matter of fact Harry Bridges also at the same time opposed the Marshall Plan? [4886]

A. I do not know that.

Q. Is it a fact, Father, that before these incidents just inquired about which began in 1939, that you had closed your mind on the subject as to whether or not Harry Bridges was a member of the Communist Party?

A. No, I had already used what we might call a reasonable, more than reasonable amount of judgment, perspicacity, investigation, to arrive at a conclusion, and a man like Mr. Bridges does not certainly change his principles. Due to that afore-

(Testimony of Father Paul Meinecke.)

said investigation, I have told you about, I had already come to the conclusion that the man was, well, if I may describe him, he seems to be affected with a virus; he has a bug in him. That bug is militant trade unionism. I do not think that the man will ever rest until everyone, white collar workers, and all the workers, are in a good union. He has dedicated his life to that ambition. That is his work, that is his ideal. And I discovered that in the earlier years of our association. Perhaps it appears here that I am going a little out of the way to put in a word for him, but I must tell the truth. When you served that subpoena on me and I was told to come here I thought I would just be able to say yes or no and go home. I live almost a thousand miles from here, over mountains and ice and snow. I was not prepared to—I did not expect this. But you have goaded me into saying these things, and so pardon me if I speak with a little bit too much earnestness or, as someone said, loquaciously. [4887]

Q. You understand, Father, that I didn't issue a subpoena for your appearance here?

A. No, but the officer of the law did, and here I am.

Q. You understand that you were subpoenaed by the defendants? A. That is correct.

Q. As a witness as to the character of Harry Bridges?

A. I beg your pardon for saying "you."

Q. With respect to that subject, Father, when

(Testimony of Father Paul Meinecke.)

did you first discuss with anyone the fact that you were coming here to testify as to the character of Mr. Bridges?

A. When did I first discuss it with someone? Last Wednesday or Thursday in Eureka, Nevada, with some of my parishioners.

Q. At that time, Father, had you been asked by someone if you would come here?

A. Just a moment. Correction. I was warned over the telephone. I was warned over the telephone by Mr. MacInnis.

Q. And when you say you were warned, you mean——

A. Then I discussed it with some of my parishioners.

Q. When you say you were warned, you mean you were alerted for the trip here to San Francisco for the purpose of giving your testimony?

A. Yes, as far as I remember it, I was alerted that I would be served a subpoena.

Q. When had you been in San Francisco last, Father, before you came here a day or two ago?

A. A month or two ago.

Q. Did you discuss this subject matter with anyone at that time?

A. In a general sort of way, yes, but not involving me personally.

Q. With whom did you discuss it in a general sort of way? A. Mr. McInnis.

Q. Have you discussed it with Mr. Bridges?

(Testimony of Father Paul Meinecke.)

A. Mr. Bridges was there on one occasion, likewise Mr. Hallinan.

Q. Father, you were in San Francisco in July of 1940, were you, sir? A. I believe I was.

Q. And at that time you were active in the Association of Catholic Trade Unionists?

A. July?

Q. July of 1940.

A. No; I am sorry; I wasn't in San Francisco. I was at Camp Mather. I know that for sure. I was out of San Francisco in 1940, I was away from San Francisco from Memorial Day until about two days after Labor Day, when I returned. I know that exactly, and I think that if you—I have got a very good witness to prove that I wasn't in San Francisco at that time.

Q. Father, did you ever have called to your attention an article by Richard Lamb on the general subject of Catholic Unionists organized to drive out the racketeers, which appeared [4889] in the San Francisco edition of the San Francisco News on Friday, July 19, 1940?

A. I am not aware of the article or not familiar with it.

Q. Are you familiar with the Monitor, the official organ of the archdiocese of San Francisco?

A. That's right.

Mr. Donohue: I will ask the clerk to mark this United States for identification next in order and ask him to direct the attention of the witness to a published letter from Harry Bridges to the Rev.

(Testimony of Father Paul Meinecke.)

Father Charles Owen Rice, and the reply thereto, and ask him——

Mr. MacInnis: May I see it first?

The Clerk: May it be marked Government's Exhibit 19 for identification, your Honor?

The Court: So ordered.

The Clerk: Government's 19 for identification.

(Newspaper marked U.S. Exhibit 19 for identification.)

Mr. MacInnis: Your Honor, this is a letter which might well be shown to Harry Bridges as a witness because it contains a letter by Bridges and a reply apparently by Father Rice, but so far as this witness would be concerned, I think it would be purely hearsay.

Mr. Donohue: Only this, if your Honor pleases: If the witness has never seen the letter and the reply, obviously I could ask him no questions about it. [4890]

The Court: You might ask him if he has seen it.

Mr. Donohue: If he has, then I think I am entitled to ask him whether it affected his judgment of Mr. Bridges.

The Court: Do you understand?

The Witness: Certainly. I will read it. I will be glad——

Mr. MacInnis: Pardon me. The question is: Did he ever read it before?

Mr. Donohue: Yes.

Mr. MacInnis: Not to read it now.

(Testimony of Father Paul Meinecke.)

Mr. Donohue: Yes, surely; had he ever seen or read the article before?

A. Finished. May I hold it for a moment?

Q. Had you ever read the letter before?

A. I do not remember. When was this again?

Mr. Donohue: Then I may not question the Father if he hasn't read it.

A. '48, August. I wasn't in San Francisco.

Q. I understand, Father, and that article or those letters were not heretofore called to your attention?

A. No, but right here, if I may, if you will pardon me, right in the article Father Rice says none of these things alone would make you a Communist.

Q. I quite understand.

A. I know of Father Rice; I know of his wonderful activities for labor. I think if Father Rice were not a Pittsburgh [4891] priest but rather working here on the West Coast closer to our picture and the man under discussion—you would say that is just my opinion——

Q. Perhaps I wouldn't Father.

A. To get to know a man you have to be close to him, to know his motivation in making a decision. It isn't easy to—oh, the greatest temptation is to make a snap judgment, and because the Communists say that a thing is red and Harry says that a thing is red, therefore he is a Communist.

Q. Father, do you draw your estimation of men's characters by what they say or by what they do?

A. Both, and between the lines.

(Testimony of Father Paul Meinecke.)

Q. Isn't there something in the Good Book that says that "Not by faith alone"?

A. Yes, but I don't see the implication.

Q. "Faith without good works is dead"?

A. Right.

Q. You are not in any way or would not in any way be persuaded in your estimation of the character of Harry Bridges by an analysis of the question as to whether or not he did follow the same doctrine as the Communist Party followed from 1939 to the present day?

A. As I answered before, I said that many another man occasionally, or almost all the time, was following what the Communists advocate, and yet we know they were not Communists themselves.

Q. That fact wouldn't create even a suspicion in your mind, Father?

A. I told you the other day if I had a reasonable suspicion that Bridges was or is a member of the Communist Party—I am with you—I wouldn't be here; I wouldn't lend aid and assistance to an enemy of our country or the principles of our country.

Q. You believe——

Mr. Hallinan: Let him finish, please.

The Witness: That we are all working for.

Q. (By Mr. Donohue): Then tell me——

Mr. Hallinan: He interrupts at every word. He tries to stop and arrest the witness.

Mr. Donohue: That is not so.

Mr. Hallinan: When he had Johnson and Crouch

(Testimony of Father Paul Meinecke.)

and Ross on there, every question that was asked—if you asked the man's middle initial, he was allowed to argue and speak upon his principles and his beliefs, and every question that is asked of Father Paul and every answer he gives, Mr. Donohue now interrupts. We ask that the witness be permitted the courtesy of finishing his answers.

The Court: Father, do you feel any degree of discourtesy in connection with your examination?

A. No, this is all somewhat——

Mr. MacInnis: Pardon me. I don't think it is proper for [4893] the Court to ask that of the witness.

The Court: I wanted the Father to be perfectly comfortable.

Mr. MacInnis: I don't think he has been allowed that, if the Court please, and I don't think it is for the witness to be allowed to point that out.

The Court: That rests in my discretion.

Mr. MacInnis: I think the counsel in the case——

The Court: A lot of other things rest in my discretion.

Mr. MacInnis: I appreciate that.

Q. (By Mr. Donohue): Have you finished, Father?
A. What were we talking about?

Q. I am not too sure, Father, by reason of the interruption.

A. I was merely trying to help you. You see, you bring back so many things. You throw a whole big load at me and I give you an answer, then you

(Testimony of Father Paul Meinecke.)

cut it up into little pieces and you throw each little piece at me, and the way you word things—I don't want you, because you are a very clever gentleman and well trained in what you are doing, to tie me into a knot.

Q. It isn't my purpose——

A. And I am using my limited intelligence to try to be truthful and honest and straightforward and tell you, as you made me swear, tell you the whole truth.

Q. We are concerned only with the truth, Father. May I ask you, Father, if you are familiar with the Labor Leader, the [4894] national organ of the Association of Catholic Trade Unionists?

A. I used to—may I just see the masthead? Yes, I used to be a regular subscriber.

Mr. Donohue: I am going to ask the clerk to mark this as United States for identification next in order.

The Clerk: May it be marked Government's Exhibit 20 for identification.

(Newspaper marked U. S. Exhibit 20 for identification.)

Mr. Donohue: I shall ask the clerk, Father, to hand you the issue of July 1, 1940, and ask him to direct your attention to a statement therein and ask you to read it and make no comment, please, until I ask you another question.

A. I have read it.

Q. Had you read that article prior to this morning, Father, with particular reference to that sec-

(Testimony of Father Paul Meinecke.)

tion which I think is marked off in red crayon?

A. July 1, 1940, I was up in the mountains as chaplain of Camp Mather.

Q. Does your best judgment——

A. No doubt my mail piled up here at the church, and when I came home I would look them all over hurriedly. You can imagine how many were stacked up; I was away for more than three months.

Q. Then the likelihood——

A. This isn't too good a period, because Memorial Day, 1940, I [4895] just had been released from the hospital where I spent almost a year ill in the hospital. The circumstances were such that I did very little reading.

Q. Then you have no recollection, Father, of having read specifically that article?

A. You are absolutely right.

Mr. Donohue: Let me have it back, Mr. Mitchell.

Q. At any time, Father, during the period that you were at St. Boniface did you ever discuss the reputation of Harry Bridges with your co-religionists at St. Boniface?

A. Not only there, but in other places, too, with many priests. Any priest who was labor-minded and interested in these things, he was bound to come up as a subject of conversation.

Q. Can you tell us the name, Father, of any of the fathers who stated to you that Mr. Bridges' reputation for truth, honesty and integrity was good?

A. You did that to me yesterday. People do

(Testimony of Father Paul Meinecke.)

not speak in such stilted language or in an utterance of that sort. They are either—they are either for the man or they are against him. If they are themselves upright people, men of good judgment and they are for him, you know that their judgment is based on something more than just the color of his hair or the curl; it is based on fundamental qualities of the man's character. And I do not think that from now to the end of my life I am ever going to have anyone come up to me and say, "You know, Father, [4896] that Joe Brown is a man of truthfulness, honesty and integrity." Put all those qualities together and get the essence of them as they appear in a man's demeanor and his behavior and his attitudes and his actions and his talking and the way he treats other people, then you know indirectly that he is a man of truthfulness and honesty and integrity. And that is the way I explained yesterday, and I repeat now, that is how I arrived at that conclusion which I gave you under oath.

Mr. Donohue: I have no further questions.

Redirect Examination

By Mr. MacInnis:

Q. Now, Father Meinecke, the prosecutor put to you these words: "Faith without good works," and he suggested that you should look to the works of Harry Bridges. Do you find any good works on his behalf in analyzing his character here?

A. Mr. MacInnis, the history of Harry Bridges is already written here, it is a part of the warp and woof of San Francisco, and while I do not give him

(Testimony of Father Paul Meinecke.)

credit for doing all the things that some of the newspapers give him credit for, I do give him credit for many of the gains and advantages that have been made by the working people of this city, not only in his own trade unions but in others which were on the occasion involved in a strike and he and his leaders and his members helped. I remember specifically when the little girls that sell ribbon behind the counters in our stores here in town—I believe [4897] they call them retail clerks—they were out on the street for a while. The white-collar workers had been underpaid at that particular time; everyone admitted it, although we all deprecated the strike, but I know that Harry Bridges and all his men were in there helping the kids get a decent wage, teaching them that if they all stick together and join their union and work from within the union they will be able to get somewhere.

I know we have discussed many times efforts to try to organize other groups in San Francisco of white-collar workers; they are usually the last to join a union, because they fail to see the value of it. If I had the time and the opportunity I could sit down and draw you a long list of good things—good works, if you wish—that Harry Bridges has done for San Francisco. I do not say thereby that I approve of all of his policies. I am not a member of his union; I am not a member of the executive board or the officials of the union. I had no voice in those things, but I always presumed that if honest and upright labor people, after considering all

(Testimony of Father Paul Meinecke.)

the other methods of getting justice, if they call a strike, they have good reason to do so, and if I were in their position I might do the same thing—although I do not like strikes because of that one feature; they hurt the common welfare, they hurt the public. But sometimes working men can't get justice in any other way except by being on a strike.

Q. The special prosecutor asked you some other questions to probe into the ways you really did consult with Harry Bridges from time to time on these matters.

Mr. MacInnis: Now, I am going to ask that there be marked for identification a letter which I have already shown the prosecutor, then I am going to show it to you and ask you if it is actually a letter that you sent to him. It is out of Mr. Bridges' files.

Mr. Donohue: I have to object to it, if your Honor please. I take it the witness has been produced as a character witness. This is merely his self-serving declaration, a personal letter which the Father wrote to Mr. Bridges, obviously has no evidentiary value. He can ask the question——

The Witness: When did I write that letter?

Mr. MacInnis: Many questions have been asked probing into whether or not these things took place. Now, if the inference of recent fabrication is at all present, why, this letter, which is a self-serving declaration from Father Meinecke to Harry Bridges in 1943, in his own handwriting, would be some

(Testimony of Father Paul Meinecke.)

evidence of the truth of what he says here. Now, that is the purpose of the question.

The Court: Do you have any objection to that letter, Mr. Donohue?

Mr. Donohue: Well, it is a self-serving declaration, if Your Honor please, but I have no objection to it.

The Court: I have not read it, but it may be received.

The Clerk: The exhibit is marked Defendant's X-2 for identification.

Mr. MacInnis: I believe it is in evidence.

The Clerk: In evidence, X-2.

(Whereupon letter, Meinecke to Harry Bridges, was received in evidence and marked Defendants' Exhibit X-2.)

Mr. MacInnis: May it be shown to Father Meinecke?

(Document handed to the witness by the Clerk.)

The Witness: Yes, I have read it.

Q. (By Mr. MacInnis): Is that your handwriting? A. Yes.

Q. Would you give it to Mr. Mitchell, please?

(Document returned to counsel by the Clerk.)

Mr. MacInnis: Reading from the exhibit just now introduced, "Young Christian Workers, 135 Golden Gate Avenue."

(Testimony of Father Paul Meinecke.)

Q. I take it that is the St. Boniface Church school address, is it?

A. No, that was the address of the Youth organization that I was taking care of.

Mr. MacInnis: "December 8, 1943.

"Dear Harry:

"I was reading over the proceedings of the sixth constitutional convention of the CIO (November 1st, 1943), and I see that on page 4 one of your speakers said, 'Labor alone is a mighty power. Religion alone is a strong force. But in order to definitely assure the winning of the peace, no greater combination is more formidable than a union of organized labor and established religion.'

"That is just what I told you Sunday night. Your influence and power for the good of the workers would double if you would go back to your religion. What about your big boss of the CIO, Phil Murray? Is not he a good Catholic and a good labor man? You could be the same, and knock all the stuffed shirts off their pins. They would never be able to touch you. You would have too many real backers who would fight for you.

"I am sending you the Crowned Heights Comment, a Catholic labor paper, to show what some of the priests are doing [4901] for labor.

"Yours in Christ, our leader, Father Paul."

Q. Is that the letter you sent Harry Bridges on the date mentioned? A. That's right.

Q. Now, the special prosecutor asked you some other questions about national and international events. Are you of the opinion that every other

(Testimony of Father Paul Meinecke.)

American citizen who opposed our entry into the war before Pearl Harbor was a Communist?

A. No, no. Many, many great patriotic leaders of this country opposed that move and after the war was all over, some good people still doubted its wisdom.

Q. Two more short subjects mentioned yesterday. Is there anything wrong with your memory, Father Meinecke?

A. No, Mr. MacInnis. I suppose I am liable to err and quote from a fallacious memory at times, but I believe my memory is as good as average and on some things I would like to say I am sharper than the average. I can name for you every parishioner in my parish, I know every person in my town by name, and by face. How many do you know in San Francisco? I know all my people in my parish over in Eureka.

Q. Let me ask you this. Some inquiry was made about the state of your health. Are you suffering from any physical disability?

A. You might call it that. I once had an amputation and lost [4902] my left leg. But it doesn't affect my memory.

Q. When did you lose your left leg?

A. 194—1939. The day that Hitler went into Poland, I went in the hospital, and about 20 days later they amputated my leg.

Q. Was there any circumstance connected with the loss of your leg that has to do with your point of view in these matters?

(Testimony of Father Paul Meinecke.)

A. Well, I suppose I have to answer, I would say this: Anybody that goes through a little suffering becomes more sensible and a little bit more keenly attuned to the needs of other people. You become a little bit less selfish. You get, having suffered a bit yourself, you are more inclined to consider the feelings and susceptibilities and sensibilities of other people. If you mean that that was my motivation for becoming interested in the working, in the trade unionism and in helping people to better their wages and hours and conditions, I suppose it contributed to it.

Q. No. I mean, was there some incident in connection with your recovery from the ailment in connection with the amputation of your leg? Were there some blood transfusions?

A. Oh, yes. Well, that was because of the people in Chicago that I was able to help. They were also militant trade unionists.

Q. Who helped you?

A. And in their papers.

Q. Who helped you in the first instance, when you were in the [4903] hospital here?

A. The first person to come to my rescue?

Q. Yes.

A. Oh, I believe that was Mr. Redfern. He is a—well, I believe he is a Master Mason. I used to kid him quite a bit about that—“Masonic blood saves life of Catholic priest.”

Q. And he donated that?

A. And that is why he told me afterwards when

(Testimony of Father Paul Meinecke.)

this Jewish boy of Chicago appealed for a donation, Mr. Redfern was the first to suggest that I pass on some of that Masonic blood to the Jewish boy in Chicago.

Q. In other words, when you were in the hospital with your leg amputated, a Master Mason donated blood to you and you in turn donated blood to save the life of a Jewish boy in Chicago, is that correct? A. That is about it.

Mr. MacInnis: That is all.

Recross-Examination

By Mr. Donohue:

Q. Father, isn't it a fact that while all the persons who opposed the entry of the United States into the war were not Communists, that all Communists did oppose the entry of the United States into the war? A. I don't know.

Mr. Donohue: Thank you, Father. No further questions.

The Witness: I would have to know all the Communists. [4904]

Mr. MacInnis: No further questions.

The Witness: May I go home?

The Court: Yes, you may be excused.

Certificate of Reporter

(We,) Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 4765 - 4905 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ RALPH D. SWEENEY,

/s/ ELDON W. RUSH,

/s/ W. A. FOSTER.

[Endorsed]: Filed March 1, 1950. [4905]

In the District Court of the United States for the
Northern District of California, Southern Division

No. 32117-H

Title 18, U.S.C. 401(1)

In the Matter of

CONTEMPT OF COURT ON THE PART OF
JAMES MARTIN MacINNIS

ORDER ON CONTEMPT

On the 4th day of April, 1950, the defendant appeared in person.

The Court having heretofore on the twenty-eighth day of February, 1950, duly and regularly adjudged James Martin MacInnis guilty of contempt of this Court and the matter of judgment and sentence

having been stayed and deferred until the conclusion of the trial stages;

It is adjudged that the defendant is sentenced to serve three (3) months in an institution to be designated by the United States Attorney General or his authorized representative.

It is ordered that the Clerk deliver a certified copy of this order on contempt to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

April 4th, 1950.

/s/ GEORGE B. HARRIS,

United States District Judge.

[Endorsed]: Filed April 4, 1950.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 4th day of April, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable George B. Harris,

District Judge.

[Title of Cause.]

SENTENCE OF JAMES MARTIN MacINNIS
ON CONTEMPT OF COURT

The defendant James Martin MacInnis being present in person, and the Court having heretofore on the twenty-eighth day of February, 1950, duly and regularly adjudged James Martin MacInnis guilty of contempt of this Court and the matter of judgment and sentence having been stayed and deferred until the conclusion of the trial stages;

It Is Adjudged that the defendant James Martin MacInnis is sentenced to serve Three (3) Months in an institution to be designated by the United States Attorney General or his authorized representative.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of this order on contempt to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

In the District Court of the United States for the
Northern District of California, Southern Division

Arising Out of No. 32117H
(U. S. v. Bridges, et al.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES MARTIN MacINNIS,

Defendant.

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court and to
Frank J. Hennessy, United States Attorney:

You, and Each of You are hereby notified that James Martin MacInnis hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment rendered and entered on April 4, 1950, finding said James Martin MacInnis guilty of contempt of court, and sentencing him to three months in prison. The name of the appellant is James Martin MacInnis; his address is 345 Franklin Street, San Francisco 2. The name of the appellant's attorney is George Olshausen; his address is 280 Union Street, San Francisco 11.

Alleged contempt arose out of the conduct of the case of the United States v. Bridges pending in the above-entitled court and therein numbered 32117H, in which appellant represented Defendants Schmidt and Robinson, and during the trial of which the

Certificates of Contempt alleges that James Martin MacInnis was contemptuous in making an assignment of misconduct on the part of the court in the cross-examination by the court of a witness called by defendants in said case.

Execution of the sentence was stayed by the District Court, and appellant is not now in custody.

/s/ GEORGE OLSHAUSEN,
Attorney for Appellant.

[Endorsed]: Filed April 12, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD

Appellant hereby designates as the record on appeal in the above-entitled case the entire contents of the record of U. S. v. Bridges, No. 32117H, in the above-entitled court. Said designation includes the proceedings at the sentencing of appellant on April 4, 1950, and the Certificate of Contempt filed by the District Court on said date; the Notice of Appeal; this Designation of Contents of Record; Statement of Points to be Relied on on Appeal.

A copy of the transcript of the testimony of U. S. v. Bridges is already on file with the Clerk of this court in U. S. v. Bridges, No. 32117H.

/s/ GEORGE OLSHAUSEN,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 13, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
ON ON APPEAL

Appellant will rely upon the following points on appeal from the judgment described in the Notice of Appeal heretofore filed:

I.

None of the matters set forth in the Certificate of Contempt taken either singly or collectively constitutes contempt.

II.

By postponing the proceedings against appellant until the close of the trial, the trial judge lost jurisdiction to proceed under Rule of Criminal Procedure 42(a) and was without jurisdiction to impose the aforesaid sentence or any sentence because no attempt was made to conform with the procedure of Rule of Criminal Procedure 42(b).

III.

The district judge was without jurisdiction to proceed under Rule of Criminal Procedure 42(a) in that the Certificate of Contempt does not allege that any conduct of appellant disrupted, threatened to disrupt, or even tended to disrupt the orderly process of the Court.

IV.

The sentence of three months imprisonment is excessive.

/s/ GEORGE OLSHAUSEN,
Attorney for Appellant.

[Endorsed]: Filed April 13, 1950.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

James Martin MacInnis, defendant herein, hereby substitutes William F. Cleary as his counsel of record herein in the place and stead of George Olshausen. The address of William F. Cleary is 345 Franklin Street, San Francisco 2.

/s/ JAMES MARTIN MacINNIS.

I accept the foregoing:

/s/ WILLIAM F. CLEARY.

I consent to the foregoing:

/s/ GEORGE OLSHAUSEN.

[Endorsed]: Filed April 19, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD

Appellant hereby designates as the record on appeal in the above-entitled case the entire contents of the record of U. S. v. Bridges, No. 32117H in the

above-entitled court. Said designation includes the proceedings at the sentencing of appellant on April 4, 1950, and the Certificate of Contempt filed by the District Court on said date.

A copy of the transcript of the testimony in U. S. v. Bridges is already on file with the Clerk of this Court in U. S. v. Bridges, No. 32117H.

/s/ WILLIAM F. CLEARY,
Attorney for Appellant.

[Endorsed]: Filed April 19, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good Cause Appearing Therefor,

It Is Hereby Ordered that appellant may have to and including the 8th day of July, 1950, to file the Record on Appeal and docket the cause in the United States Court of Appeals in and for the Ninth Circuit.

Dated: May 16, 1950.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed May 16, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, or a true and correct copy of an order entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the appellant, to wit:

Order on Contempt.

Certificate in Conformity With Rule 42(a) Federal Rules of Criminal Procedure.

Order on Contempt.

Minute Order of April 4, 1950—Sentence of James Martin MacInnis on Contempt of Court.

Notice of Appeal.

Designation of Contents of Record.

Statement of Points to Be Relied On on Appeal.

Substitution of Counsel.

Designation of Contents of Record.

Order Extending Time to Docket.

In Witness Whereof, I have hereunto set my hand

and affixed the seal of said District Court this 6th day of July, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Title of District Court and Cause.]

EXCERPTS FROM THE TESTIMONY IN No.
32117-H UNITED STATES OF AMERICA
VS. HARRY RENTON BRIDGES, HENRY
SCHMIDT AND J. R. ROBERTSON

Before: Hon. George B. Harris,
Judge.

Wednesday, December 21, 1949

* * *

PAUL CROUCH
witness for the Government.

Cross-Examination

By Mr. Hallinan:

* * *

Q. Have you been in any institution for nervous or mental disorders?

Mr. Donohue: Oh, I object, if Your Honor pleases. That is a wholly improper question.

Mr. Hallinan: It is entirely proper to find out of this witness' mental background.

Mr. Donohue: There is a rule of law, if Your Honor pleases, that no witness may be asked any question the answer to which may tend to degrade him. That is the only purpose for which this shot in the dark could be asked of this witness by Mr. Hallinan. After all, a witness is entitled to some consideration.

The Court: The objection is sustained.

* * *

Thursday, January 12, 1950

LEWIS HERBERT MICHENER, JR.

witness for the Government.

Cross-Examination

By Mr. MacInnis:

Q. Do you know a man named Dr. Ernest Cohen?

A. I believe I do, sir. I do know a doctor by that name.

Q. He is a psychiatrist in Beverly Hills, isn't he? A. That's correct, sir.

Q. And he has treated you for mental illness in 1944, hasn't he?

Mr. Paisley: Oh, Your Honor——

The Court: The objection is sustained.

* * *

Tuesday, April 4, 1950

Verdict

* * *

The Clerk: April 10.

The Court: That is all with respect to the defendants. They may be seated.

Mr. Hallinan: Yes, your Honor.

The Court: Now I have several matters affecting counsel. I might ask counsel to permit me without interruption to say what I have to say, and hereafter, at the conclusion, you may interpose whatever legal motion you may desire, or any individual request on your own behalf, or either of your behalves. I suggest you remain seated, counsel, if you wish.

I approach these matters affecting the attorneys with considerable diffidence and no amount of reservation. For when I deal with the attorneys, I deal with officers of this court. I desire to address myself briefly to Mr. Hallinan and Mr. MacInnis. And I say to you that from the beginning of this trial you have embarked upon a course of conduct designed and calculated to contemptuously provoke the Court in the hope that such provocation would lead the Court to commit error or plunge the case into a mistrial.

That such was your purpose has been entirely manifest to me. Such conduct is not alone an affront to the dignity of the Judiciary of the United States, it is an affront to the dignity, good name and honor of a great profession. I said to you, and I

repeat, that members of the bar are officers of the court. My experience has demonstrated that a vast majority of lawyers, in and out of court, conduct themselves with propriety, integrity, dignity and honor.

Your assault on this Court cannot go unchallenged, and I am determined, so far as I am able, in my humble capacity, that such behavior as displayed by you shall not be repeated in other Federal courtrooms. America is justifiably proud of its judicial system, and anyone who attempts to degrade it or weaken it is working an injustice.

With regard to you, Mr. Hallinan, I retrace my steps momentarily to remind you that on the 22nd of November, 1949, the Court adjudged you guilty of criminal contempt, and thereafter regularly filed a certificate under the provisions of Rule 42(a) of the Rules of Criminal Procedure. Thereafter, upon the request of your client, Mr. Harry Bridges, I permitted you to remain as counsel in the case and granted a stay of execution until termination of the trial.

The consent of the Court was obtained upon the belief, reliance and understanding that there would not be a repetition of such conduct. Unfortunately, within a comparatively brief period you deliberately launched into a series of acts and conduct again resulting in criminal contempt, which I have more particularly found and specified in a certificate. During the course of the trial and since the first adjudication, you have, as a pattern of deliberate misconduct and in flagrant contempt of this Court,

the dignity thereof and the respect due to it, sought to and did malign and abuse Government witnesses, attorneys and agents in a loud, contemptible manner. It is difficult to portray by written word your intonation, gestures and deportment, as well as the belligerent tone, mode and manner created. It is difficult to portray by the written word the loud language used by you and the contemptible language used by you, both in and out of the presence of the jury; all of which conduct was designed to bring into disrepute this Federal Court, as well as the judge thereof, charged with the administration of justice.

Accordingly, I specifically find that you, Vincent Hallinan, have been and you are now guilty of contemptuous conduct and misbehavior in the presence of the Court, in the particulars specified in the certificate which I have filed herein; thus obstructing the administration of justice. I therefore adjudge that you have been guilty of contempt of this Court for such conduct in the course of this judicial proceeding. It is adjudged that Mr. Vincent Hallinan is to serve six months in an institution to be designated by the United States Attorney General or his authorized representative, said sentence, however, to run concurrently with the previous judgment and sentence heretofore regularly made and entered on or about the 22nd day of November, 1949.

I am advised that an appeal has been prosecuted and is now pending before the Court of Appeals

with respect to the prior adjudication, and that that honorable Court has granted a stay. It would seem to me meet and proper, and in accordance with the ends of justice, therefore, to permit you, Mr. Hallinan, to remain at large with respect to the second adjudication which I have led here and which I find herewith, upon your own recognizance.

With respect to——

Mr. Hallinan: Might I comment on that now, your Honor?

The Court: Yes.

Mr. Hallinan: You suggested that after——

The Court: Yes, you may make whatever legal motion you have.

Mr. Hallinan: Well, I wanted to file an affidavit to disqualify you from pronouncing the matter in the same form as the one that I have heretofore filed. Might that be considered as being filed prior to this adjudication?

The Court: Yes, sir.

Mr. Hallinan: And I might say, then, also, your Honor, I see that there is a considerable moderation in many of the things that you have said. I feel that in this case, as you have expressed yourself to the jury, a great deal of bitterness came up and was reflected. I think, of course, one is a poor judge in his own cause; so a judge sitting on the bench thinks that certainly these passions and bitternesses do not reach to him and he is acting in an entirely judicious manner.

As far as I myself am concerned, I had no desire to procure a mistrial or anything of that kind. I

was shocked at the verdict. I thought we were going to get a verdict of acquittal. I didn't think it was going to be possible for a conviction to be produced on the testimony that was adduced here. So the Court is mistaken in that.

I might say this: That in all the things that I did and said in this court, I was acting according to my best lights to properly protect the rights of my client. Your Honor must see the incongruity of supposing that a private lawyer, helpless, just alone by himself, coming in and for some purpose such as that affronting the power of the Court and the power of the representatives of the Government, for some purpose of doing mischief or making himself unpleasant or anything of that kind. Your Honor should realize, having practiced law yourself, the temptation that a lawyer is under to do exactly the contrary, to overlook what he thinks are errors of the Court, to keep quiet in the face of what he thinks to be erroneous and even tyrannical rulings of the Court, to bow to the powers of the representatives of the Government.

I can only say this, Judge, that Harry Bridges, as he stood here with his two co-defendants, is a man with tremendous handicaps against him and against them. He has been maligned and prejudiced by newspaper articles, matters of that kind, for a great many years. He has had against him now special representatives and general representatives of large arms of the Government, and they have done all they could to procure a conviction.

To say that a private lawyer, then, got up and

so conducted himself that his—well, let us say his—courage in attempting to defend his client could be construed by the Court into such a course of conduct as to put himself at loggerheads with the Judge, with the prosecuting department, with the whole Government, is to pay an unexpected and strange compliment, your Honor; and it certainly makes me feel that if this were the last case that I tried, the very words that you uttered here would make me realize and pass on to my children that at least my swan song was conducted in accordance with the highest traditions of a noble profession.

The Court: No response need be made on my behalf, for I stand on the trial record and the transcript of proceedings, with respect to any alleged or asserted bitterness that I may have been claimed to entertain.

With regard to James Martin MacInnis, this Court heretofore, and on the 28th day of February, 1950, regularly adjudged James Martin MacInnis guilty of contempt of this Court. The matter of judgment and sentence having been stayed and deferred until the completion and conclusion of the trial, and the trial having been concluded and terminated, now said James Martin MacInnis is sentenced to serve three months in an institution to be designated by the United States Attorney General or his authorized representative. Although, in my opinion, Mr. MacInnis' contemptuous conduct was just as studied and flagrant as that of Mr. Hallinan, nevertheless I feel he is entitled to a lesser sentence, for the reason that he appears to have been, to some

extent at least, inspired by his senior colleague, Mr. Hallinan.

I hand to you, Mr. Mitchell, the original orders and documents, together with copies thereof, bearing upon the foregoing matters, for transmission to the Clerk's and Marshal's office, respecting Mr. Hallinan. The same order will prevail, that he may remain at large on his own recognizance pending whatever review he may desire to take from the adjudication of contempt.

Mr. MacInnis: I assume that I am invited to make a reply to the remarks of the Court as well.

The Court: Whatever legal response you may have.

Mr. MacInnis: Yes. Well, first of all, I suppose that the record may show the same motion which I have heretofore made, asking for the disqualification of yourself in passing upon any personal difficulty between this Court and me.

If this were not an atmosphere of grimness in which we now find ourselves, after what to me was a most astonishing verdict, I would be constrained to laugh—sitting, as I did, and listening to you tell us that we embarked upon a course of conduct calculated to provoke the Court into error that would in some way result in a mistrial, and telling me that my conduct was probably inspired by the contemptuous conduct of a greater degree as committed by my senior associate, Mr. Hallinan.

If I am invited to reply, as I feel I now am, I would like to point these things out. The matters in which the citation for contempt was issued

against me grew out of the interrogation of the Court of a witness produced by the defense, Father Paul Meinecke, a priest of the Roman Catholic Church. We sat here, in fact the walls probably still echoed with the departure of Lawrence Ross, a Government witness who had confessed his own perjury. He received nothing but a benign smile from the prosecution, and not a word of reproof from the Court. But this simple priest, who said a word in favor of the defendant Harry Bridges, was first put to a gruelling cross-examination by the prosecution. That was its right—it had the right to cross-examine witnesses. And then the Court turned on the witness. Your Honor mentioned gestures, words, looks in speaking of us. I have in mind your gestures and your words and your looks when you attacked that priest who testified here. Anything that I said I may have said in haste, but I said it in an effort to preserve a judicial atmosphere in this room.

When you speak of us further, generally, you speak of the two counsel for the defense as maligning and abusing Government witnesses and Government counsel. I have in mind that not a word of reproof passed your lips when the special prosecutor referred to the three defendants as “rats,” not a word of reproof crossed your lips when he referred to Mr. Hallinan as a “goat”; apparently the special prosecutor was a person entitled to some greater protection within the purview of this sanctuary in which we now find ourselves.

Assaults upon the Court. I have one or two

things I would like to say further, and then I will sit down. The course of conduct. I have been observing the course of conduct indulged in by the Court. It may be that I have deceived myself, it may be that I have been overanxious in this case; it may be that I am peculiarly susceptible, because of the bitterness of this case, to arrive at conclusions which I might not otherwise embrace. I do not think so. I recall most vividly an occasion following the appearance upon this witness stand of the men Johnson and Crouch, those men who came here and said that Bridges was in New York upon a particular occasion—men who similarly left here without any word of reproof from the Court. Then a legal discussion came up as to whether or not a certain question could be asked of a prosecution witness. The witness was named Kessler; he was an agent of the Immigration Service. The examiner was Mr. Hallinan. He was attempting to cross-examine that witness upon his motives, and a dispute arose as to the propriety of the question, whereupon the Court took a recess, upon the asserted quest of some cases from our courts of last resort. The Court came back upon the bench, apparently with a prepared statement in his hand, and in referring to the argument over the testimony of the witness, said more or less as follows: “Your question, Mr. Hallinan, is reminiscent to the Court of a similar tactic engaged in by defense counsel in the case of *Morton v. the United States*, in which our court said”—and then you proceeded to read to the jury a dissertation, saying that the defendants

had no defense, that the guilt of the defendants was uncontradicted, that as a last desperate gesture, in effect, an attack was made upon the motive of the witness. And then when it was pointed out, your Honor turned to the jury and said, "Forgive the unfortunate language of the Court."

I say that it is ridiculous to claim that Mr. Hallinan and I embarked upon any studied course of conduct to provoke this Court into error. When I hear those words, I feel even more like a fool. I embarked upon our trial in this case with the hope that we would receive a fair trial in every particular, and I continued to believe that we were going to have a fair trial even after the episodes of the first few days. Even after that stormy day when Mr. Hallinan tried to make an opening statement and was continually interrupted by the Court and by the prosecution, I continued to argue, "Something has happened. If the Court thinks we are attacking him in some way, the Court's pride is involved. He is really not trying to hurt us." I believed that for a while. I did.

Now when I hear that we embarked in this case in a studied effort to provoke this Court into error, I shudder at what must be the fate of people who, unlike ourselves, will not stand up and say what they think. That is all I have to say.

The Court: Mr. Mitchell, you may have the orders and certificates for transmission.

The Clerk: Yes, your Honor.

The Court: And with respect to your remarks, Mr. MacInnis, similarly I stand on the record of

the trial in this case, without apology either to the attorneys for the defendants. The defendants have had a fair and impartial trial at my hands.

We may now stand in recess.

(Whereupon an adjournment was taken.)

[Endorsed]: Filed April 13, 1950.

[Endorsed]: No. 12599. United States Court of Appeals for the Ninth Circuit. James Martin MacInnis, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed July 6, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12599

JAMES MARTIN MacINNIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF GROUNDS TO BE RELIED ON UPON APPEAL

Comes now appellant above named and pursuant to the provisions of Rule 19(6) of the rules of the above-entitled Court hereby states that the points to be relied on upon appeal are as follows:

1. None of the matters set forth in the certificate of contempt taken either singly or collectively constitutes contempt.

2. The alleged contempt occurred on February 1, 1950. The order of contempt and the certificate of contempt were not signed or certified by the District Court until the 28th day of February, 1950, and were not filed until March 1, 1950, and the judgment was not pronounced or issued until the 4th day of April, 1950. By postponing the issuance and filing of the order of contempt and the certificate for more than four weeks subsequent to the alleged contempt and by postponing the pronouncement of sentence and judgment for a period of more than two months subsequent to the alleged contempt, the trial court lost jurisdiction to proceed under Rule of Criminal Procedure 42(a) and was not empowered to impose the aforesaid sentence and judgment or any sentence or judgment, and because no attempt was made to conform with the procedure of Rule of Criminal Procedure 42(b).

3. Because the certificate of contempt does not allege that any of the conduct of appellant disrupted, threatened to disrupt, tended to disrupt or

was even intended to disrupt the orderly process of the Court.

4. Because the record of the proceedings at the time of the pronouncement of sentence and judgment show the sentence of three months imprisonment was imposed not solely because of the alleged acts of contempt specified in the certificate but was imposed in inseverable part as punishment for unidentified and unspecified acts of appellant concerning which no certificate in conformity with Rule 42(a) of the aforesaid rules of criminal procedure was made or filed.

5. Because the sentence of three months imprisonment is excessive.

WILLIAM F. CLEARY, ESQ.,

/s/ WILLIAM F. CLEARY,

Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 26, 1950.

No. 12599

United States
Court of Appeals
for the Ninth Circuit.

JAMES MARTIN MacINNIS,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

No. 12599

United States
Court of Appeals
for the Ninth Circuit.

JAMES MARTIN MacINNIS,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

No. 12599

United States Court of Appeals
For the Ninth Circuit

JAMES MARTIN MacINNIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STIPULATION AND ORDER THEREON FOR
CORRECTION OF OMISSION IN RECORD
ON APPEAL

(Rule 39(b), F. R. Crim. Proc. and
Rule 75(h) F. R. Civ. Proc.)

It Is Stipulated that a material omission in the printed Transcript of Record in this appeal, made by error in failing to designate for printing, be corrected by adding thereto omitted pages 4974 to 4978, inclusive, Volume 46, of the Reporter's Transcript of the testimony and proceedings of Thursday, February 2, 1950, in the case of United States of America, Plaintiff, vs. Harry Renton Bridges, Henry Schmidt, and J. R. Robertson, Defendants, No. 32117-H, in the District Court of the United States for the Northern District of California, Southern Division; that the entire record in said case of United States of America, Plaintiff, vs. Harry Renton Bridges, et al., having been filed and docketed on appeal from said District Court to this

Court, in No. 12597, C. A. 9th Cir., in Harry Renton Bridges, et al., vs. United States of America, said entire record having been designated for printing, and is now being printed.

Said omission, hereby stipulated for addition, is attached hereto and made a part hereof, and marked Exhibit "A"; to be printed at Government's expense and captioned Supplemental Transcript of Record.

Dated: December 14, 1950.

/s/ JAMES M. McINERNEY,
Assistant Attorney General.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ R. B. McMILLAN,
Assistant United States
Attorney.
Attorneys for Appellee.

/s/ WILLIAM F. CLEARY,
Attorney for Appellant.

It Is So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WM. E. ORR,
Circuit Judge.

/s/ WALTER L. POPE,
Circuit Judge.

Dated: December 14, 1950.

EXHIBIT "A"

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 32117-H

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY RENTON BRIDGES, HENRY
SCHMIDT and J. R. ROBERTSON,

Defendants.

Before: Hon. George B. Harris, Judge.

PARTIAL REPORTER'S TRANSCRIPT

Thursday, February 2, 1950,

Vol. 46, Pages 4974-4978

The Court: There was one other item with respect to the matter of order, and that is, I did not rule upon—at least I can't recall having ruled upon—the motion to strike the testimony of Father Paul Meinecke. Mr. Donohue, you make such a motion?

Mr. Donohue: Yes, on the ground, if your Honor please, that a reading of his testimony would indicate that the father was giving an opinion of his own with respect to the character of the defendant Bridges, and my understanding of the law is that only his general reputation in the community in

which he lives or works is admissible in evidence and that the father negatived the possibility that the opinion which he voiced was [4974*] his general reputation rather than it was his own opinion. On that basis I ask your Honor to move to strike.

The Court: Mr. MacInnis?

Mr. MacInnis: Well, I am rather surprised that the matter has thus come up again. I thought that the Court had ruled on it.

The Court: No, I had not.

Mr. MacInnis: And in our favor.

The Court: I examined the record last night and it appears I have not ruled, nor have I ruled today on it.

Mr. MacInnis: Well, now, it would appear to me, recalling very vividly as I do the testimony of Father Paul Meinecke, that his words on direct examination met the same standards set by the Court and by our courts of last resort for the testimony of any character witness. Now, he said that he was basing his answer upon his own acquaintanceship with the individual involved, Mr. Harry Bridges, and upon such remarks and statements of other persons in the community as had come to his ears, and that it was a composite of—I can't quote his exact words, but what he believed to be the reputation in the community.

Now, thereafter he was subjected to lengthy cross-examination, and in the course of that cross-examination he made many statements which, of course, had nothing to do with general reputation but which involved, in the words of the prosecutor, personal

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

opinion. However, we didn't invite that cross-examination; the prosecutor did, and the prosecutor undertook to argue with the particular witness as to what were the bases for [4975] his personal opinion. And the whole examination departed from the concept of general reputation in the community of a particular witness. Now, the cross-examiner having thus departed from the ordinary scope of the direct examination, can hardly now rise before us and say, "This defendant doesn't meet the standard required by law." I can't think of any possible disability that that testimony would contain.

Mr. Donohue: Your Honor, may I ask you at this time, in reading the testimony of the father last night—I read also the testimony of a number of other character witnesses. May I ask your Honor at this time to withhold any ruling on the testimony of the father in order that we may, perhaps, make a broader motion at a subsequent time which may include the testimony of other witnesses. We would like to be heard at that time on it.

The Court: Well, I should like the motions to be made timely, to the end that we keep a current record. It is difficult to have these matters become embedded in the record, so to speak, and then at some later time or at a later hour make a motion to strike.

Mr. Donohue: If your Honor pleases, would your Honor hold your ruling on this matter? We shall come to a conclusion on other matters not later than Monday.

The Court: Do you have in mind any specific items that I might have in mind? [4976]

Mr. Donohue: Not at the minute, if your Honor please. I don't recall the names. I recall the testimony without being able to ascribe it to persons.

Mr. Hallinan: It seems to me, if the Court please, if I might be heard in that, that the purpose is, by including some other minor matter, to make the motion to strike Father Meinecke's testimony seem a little less infamous. I think we ought to have a rule on that one item alone.

The Court: Well, I am prepared to rule on the matter.

Mr. Hallinan: Well, we ask that your Honor rule on it, now.

The Court: I am prepared to rule on the matter. I will deny the motion to strike. I read the testimony last evening, and I feel that, probably as Mr. MacInnis pointed out, that there was an attempt on his part to have a composite; at least, that was the father's testimony.

And I might say, Mr. MacInnis, that in reading the transcript, I concluded that the proper administration of justice and maintenance of respect due the courts require me to certify that yesterday you committed conduct in the actual presence of this Court constituting contempt.

Mr. MacInnis: Before your Honor finds——

Mr. Hallinan: Might I represent Mr. MacInnis in this before you say anything further?

The Court: And I say for the record, that the Court, in [4977] the proper exercise of its function, propounded a relative and pertinent question to the

witness, Father Paul Meinecke, whereupon Mr. MacInnis addressed the Court as follows:

“I think you should cite yourself for misconduct. I have never heard anything like that. You ought to be ashamed of yourself.”

That appears at transcript page 4796. I say to you, Mr. MacInnis——

Mr. Hallinan: Your Honor, might I be heard on that before——

The Court: I say to you, Mr. MacInnis, that this Court will file a certificate and an order pursuant to Rule 42 of the Rules of Criminal Procedure.

Mr. Hallinan: Your Honor, may I be heard?

The Court: One moment, Mr. Hallinan.

Mr. Hallinan: I have never heard such a—Why can't I be heard in the matter?

The Court: And making such order and fixing such punishment will be deferred. I will defer the punishment to later, to a later date in the trial.

Mr. Hallinan: Very well.

The Court: We will now stand adjourned until tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken to tomorrow, Friday, February 3, 1950, at 10:00 o'clock a.m.)

[Endorsed]: Filed Dec. 20, 1950. [4978]

No. 12,599

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JAMES MARTIN MACINNIS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the United States District Court, Northern
District of California, Southern Division.**

OPENING BRIEF FOR APPELLANT.

WILLIAM F. CLEARY,

57 Post Street, San Francisco 4, California,

Attorney for Appellant.

FILED

(1961-1962)

PAID BY APPELLANT

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No. 12,599

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JAMES MARTIN MACINNIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court, Northern
District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

I.

JURISDICTIONAL STATEMENT.

(In compliance with subdivision 2(b) of rule 20)

There were no pleadings in this case. It was instituted by the filing with the Clerk of the District Court two documents, one bearing the sub-title "ORDER ON CONTEMPT" and the other bearing the sub-title "CERTIFICATE IN CONFORMITY WITH RULE 42(a) FEDERAL RULES OF CRIMINAL PROCEDURE". Each of these two documents was

dated "this 28th day of February, 1950, at San Francisco, California" and was signed

"George B. Harris

United States District Judge."

Each was filed March 1, 1950. (R. 2 to 4.)

The recitals contained in the aforesaid order on contempt were as follows:

"On the first day of February, 1950, the defendant appeared in person.

"It is adjudged that the defendant is guilty of contempt of court for misconduct during the judicial proceeding in United States v. Harry Renton Bridges, Henry Schmidt and J. R. Robertson, No. 32117-H, *as specified in the accompanying certificate.**

"It is ordered that the defendant appear before this Court for sentence upon the termination and conclusion of the trial stages in United States v. Harry Renton Bridges, Henry Schmidt, and J. R. Robertson, No. 32117-H.

"It is further ordered that the Clerk deliver a certified copy of this Order on Contempt and the accompanying Certificate to the United States Marshal or other qualified officers." (R. 2.)

The recitals contained in the aforesaid certificate were as follows:

"In conformity with Rule 42(a), Federal Rules of Criminal Procedure, I hereby certify that the conduct for which the defendant is punished for

*All emphasis in this brief added by appellant.

criminal contempt was committed in my presence and was seen and heard by me during a session of the United States District Court for the Northern District of California, Southern Division, under the following circumstances:

“On the morning of Wednesday, February 1, 1950, following the examination by counsel for defendant and counsel for the Government, of the witness, Father Paul Meinecke, the Court had occasion to interrogate the witness. After propounding several questions, the Court asked a proper and pertinent question, directed toward the physical well-being of the witness, to wit:

“Q. Have you been recently subjected to medical treatment, Father?

“(Tr. p. 4794, lines 20-21.)

“Following such question, Mr. MacInnis jumped to his feet, participated in a critical remonstrance of the Court, at the conclusion of which he stated to the Court in a belligerent manner in the presence of the jury, to wit:

“Mr. MacInnis. I think you should cite yourself for misconduct.

“The Court. Ladies and gentlemen——

“Mr. MacInnis. I have never heard anything like that. You ought to be ashamed of yourself.

“(Tr. p. 4796, lines 2-6.)

“The entire record of the testimony of Father Paul Meinecke, designated Exhibit A, is attached hereto, and is made a part of the Certificate.” R. 3 and 4.

Thereafter, to wit on **April 4, 1950**, there was filed a second **“ORDER ON CONTEMPT”** which between

the title of the court and the title of the case contained these words:

“NO. 32117-H
Title 18, U.S.C. 401 (1)”

The body of said second order on contempt reads as follows:

“On the *4th day of April, 1950*, the defendant appeared in person.

“The Court *having heretofore on the twenty-eighth day of February, 1950*, duly and regularly adjudged James Martin MacInnis guilty of contempt of this Court and the matter of judgment and sentence having been stayed and deferred until the conclusion of the trial stages;

“It is adjudged that the defendant is sentenced to serve three (3) months in an institution to be designated by the United States Attorney General or his authorized representative.

“It is ordered that the Clerk deliver a certified copy of this order on contempt to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

“**April 4th, 1950.**

“/s/ George B. Harris,
United States District Judge.”

It is apparent from the above that the District Court *claimed* jurisdiction to adjudge appellant guilty of contempt of court and to sentence him to three months imprisonment under Title 18, U.S.C. 401 (1) and Rule 42 (a) Federal Rules of Criminal Pro-

cedure. [One of the points made on this appeal is that the District Court lost jurisdiction to punish appellant for the asserted contempt of February 1, 1950 by not proceeding at once, that is “**summarily**”, to punish appellant.]

Within the time required by Rule 37, Federal Rules of Criminal Procedure subsequent to the sentencing of appellant (to wit on April 12, 1950 or 8 days subsequent to the pronouncement of said sentence) a notice of appeal was filed in the District Court. (R. 74 and 75.) This court has jurisdiction of the appeal under Title 28 U.S.C. Section 1291.

II.

STATEMENT OF THE CASE.

(In compliance with subdivision 2(c) of Rule 20)

As hereinbefore shown, this is an appeal from a judgment and sentence of criminal contempt, summary **in form** (in that there was no notice and hearing or opportunity to be heard in the District Court). The questions involved were raised for the first time in the “Statement of Points to be Relied Upon on Appeal” filed in the District Court April 13, 1950 (R. 76 and 77) and were restated in slightly different words in the statements of Grounds To Be Relied Upon On Appeal filed in this court September 26, 1950. Briefly, they are as follows:

(1) That none of the matters set forth in the certificate of contempt either singularly or collectively constitutes contempt.

(2) That the District Court lost authority and jurisdiction to punish appellant under Rule 42(a) Federal Rules of Criminal Procedure before, and long before, it undertook to impose punishment upon appellant.

(3) That because the District Judge did not certify that the conduct of appellant disrupted, threatened to disrupt or tended to disrupt, or, even, was intended to disrupt the orderly process of the court, the District Judge did not have authority or jurisdiction to "summarily punish" appellant under Rule 42.

(4) That the *record of the proceedings at the time of the pronouncement of sentence and judgment* show that the sentence of three months imprisonment was imposed not solely because of the alleged acts of contempt recited in the certificate but was imposed in **inseverable part** *as punishment for unidentified and unspecified acts of appellant concerning which no certificate in conformity with Rule 42(a) Federal Rules of Criminal Procedure was made or filed* and that the District Court had no authority or jurisdiction to impose a punishment on appellant under Rule 42(a) aforesaid which was, either in its entirety or in inseverable part, *for acts concerning which no certificate in conformity with Rule 42(a) aforesaid had been made and filed.*

(5) That the sentence of three months' imprisonment is excessive.

III.

SPECIFICATION OF ERROR.

1. The United States District Court and the Judge thereof erred in adjudging appellant to be in contempt of court.

2. The United States District Court and the Judge thereof erred in adjudging appellant to be in contempt of court under the claimed authority of Rule 42(a) Federal Rules of Criminal Procedure twenty-eight days subsequent to the day on which the conduct of appellant so adjudged to constitute contempt, occurred.

3. The United States District Court and the Judge thereof erred in imposing punishment on appellant, under the claimed authority of Rule 42(a) Federal Rules of Criminal Procedure sixty-two days subsequent to the day on which the conduct of appellant, adjudged to constitute contempt of court, occurred.

4. The United States District Court and the Judge thereof erred in imposing punishment on appellant, under the claimed authority of Rule 42(a) Federal Rules of Criminal Procedure in inseverable part for unspecified and unidentified acts of appellant concerning which no certificate, as required by Rule 42(a) Federal Rules of Criminal Procedure, was ever filed.

5. The United States District Court and the Judge thereof erred in adjudging appellant to be guilty of contempt of court under the claimed authority of Rule 42(a) Federal Rules of Criminal Procedure for conduct which was not certified by said judge to have been conduct which disrupted or threatened to disrupt or tended to disrupt the orderly process of said court.

6. The United States District Court and the Judge thereof erred in imposing a sentence on appellant of such length of imprisonment as, under all of the circumstances of the case, was excessive to the point of being vindictive and oppressive.

IV.

SUMMARY OF BACKGROUND FACTS.

In addition to the facts hereinbefore mentioned, the background facts of the case are as follows:

The asserted acts of contempt occurred during the course of a criminal trial in which appellant was appearing as counsel for two of the three defendants. The charges against the three defendants were, in substance that the defendant Bridges had committed perjury in testifying in a naturalization case that he was not and had not been a member of the Communist Party, that the other two defendants had aided and abetted him in the commission of such perjury and that the three had conspired to have the defendant

Bridges defraud the government of the United States by committing such perjury.

The trial of said criminal case commenced on November 14, 1949 and ended on April 4, 1950. The asserted contempt occurred on February 1, 1950, during the early stages of the presentation of the Defense case and while Father Paul Meinecke, a Roman Catholic Priest, was on the stand as a character witness for the defense.

Father Meinecke had testified that he had been stationed in San Francisco for a period of about ten years commencing in 1936 or 1937, and while in San Francisco had been the organizer of The Association of Catholic Trade Unionists, an instrument of the Roman Catholic Church organized specifically at the wishes of Pope Pius XI [to combat Communism in labor unions (R. 44)]. That during those ten years he had been in close contact with the defendant Bridges and had discussed Bridges with many persons and that in his opinion Bridges was not only a truthful, honest, and upright man, but he was more, and that he would not publicly be known as a very good friend of Bridges had he the slightest doubt of his character (R. 5 to 11).

On cross examination he testified that he had heard rumors that Bridges was a Communist and had made it his business to investigate that very thing, that in his opinion Bridges was not a Communist but only a militant trade unionist and that if he had "the slightest notion" or "any suspicion whatsoever" that

Bridges was a Communist, he would not be there as a witness for Bridges or a friend of Bridges (R. 15, 16) and that his opinion concerning Bridges' character was largely dictated by public opinion, that is the opinion of others, their estimation of the man (R. 22, 23).*

As soon as the cross examiner stated that he had no further questions Judge Harris undertook to cross examine Father Meinecke and it was during the cross examination of the priest by Judge Harris that the asserted act of contempt occurred.

V.

ARGUMENT.

APPELLANT'S FIRST POINT.

NONE OF THE MATTERS SET FORTH IN THE CERTIFICATE OF CONTEMPT, EITHER SINGULARLY OR COLLECTIVELY, CONSTITUTE CONTEMPT.

When defense counsel, during the course of a criminal trial, and in the presence of the jury, says to the judge presiding, "You should cite yourself for misconduct. * * * I have never heard anything like that. You should be ashamed of yourself.", every *appearance* of contempt of Court is present. Yet, as we all

*In view of the charges against the defendants and in view of the known stand of the Roman Catholic Church with respect to Communism and Communists this testimony of Father Meinecke "was", as we say later in this brief, "like the testimony of a recording angel in favor of a person on trial for a heresy which he denied".

know, *appearances are often deceiving*. It is so in this instance.

The statements of appellant above quoted, and set forth in the certificate of U. S. District Judge George B. Harris as the act of contempt for which the punishment is imposed on appellant, did not constitute an act of contempt of Court but were, in all particulars, pertinent and proper. By this we mean several things. (1) We mean that Judge Harris should have cited himself for misconduct. (2) We mean that Judge Harris should have been ashamed of himself. (3) And we mean that appellant was not only within his rights, but was compelled by his duty as counsel, to call the two foregoing facts to the attention of *both the Court and the jury*, and to do so in *forceful and unmistakable language*.

To show that these things are so, we must explore the transaction in some detail along several separate but converging avenues, and along several crossroads which tie those converging avenues together at various distances from the point of convergence.

ONE.

Let us begin this exploration by examining one of the recitations made by Judge Harris in the certificate which he signed and filed, and which forms a part of the judgment.

It is as follows:

“* * * After propounding several questions, the Court asked a *proper and pertinent question*, di-

rected toward the physical well-being of the witness, to wit:

‘Q. Have you been recently subjected to medical treatment, Father? * * *’”

It will be observed that the portions of this recitation which we have emphasized constitute an *expression of opinion* on the part of Judge Harris, and *are self-serving in nature*, that is, that they are designed to exculpate Judge Harris from any error, fault, or blame in the asking of the quoted question and to highlight the remarks of appellant in such a way as to indicate that those remarks were absolutely inexcusable.

If, by the term “*physical well-being*”, Judge Harris intended to convey the thought of *bodily health* as distinguished from *mental health*, this recitation in the certificate is *demonstrably false*, or, in other words, it is not only not supported by the record, but the record, and particularly the record of Judge Harris’ own words, *prove* that it is false.

(It should here be stated that whether the question was directed toward the *bodily health* or the *mental health* of Father Meinecke is of vital importance. That this is so will be hereinafter shown.)

First: observe that the quoted question, directed as it was to a *character witness* in a criminal trial, would have been *both irrelevant and immaterial*, and, therefore, *neither proper nor pertinent*, if it were directed toward the *bodily health*, as distinguished from the

mental health, of the witness. This is to say: the *mental health* of the witness would have had a bearing on the credibility of the witness, on the trustworthiness of his testimony, whereas the *bodily health* of the witness could have had **no bearing either on that subject or upon any other possible issue of the case.**

From this we see that the recital of Judge Harris that the question was "a proper and pertinent question" is in conflict with the further recital of Judge Harris that the question was "directed toward the physical well-being of the witness" *if* Judge Harris, by the term "physical well-being", intended either to exclude, or to ignore, or to point away from, or even to encompass anything other than, the **mental health** of Father Meinecke.

Second: observe the word "**subjected**" in the quoted question, viz.: "Have you been recently **subjected** to medical treatment, Father?"

The word "subjected" is derived from the two Latin words meaning *under* and *throw*. It means: "to **make subject to some action or agent.** To *expose to the operation of some law or agency.* To place before for consideration **and disposition.** To **subdue.** To lay or spread before; **place beneath.**" Funk & Wagnall's Desk Dictionary.

A person who, of his own volition, goes to a physician for diagnosis and treatment is not being "**subjected**" to medical treatment. Persons who have bodily as distinguished from mental ills are not normally **subjected** to medical treatment. Conversely,

persons who are suffering mental illness are frequently **subjected**, *by the will or compulsion or coercion of others*, to medical treatment.

Thus the word "**subjected**" in the quoted question had a connotation pointing in the direction of *mental* illness rather than in the direction of *bodily* illness.

Third: the record discloses that the four questions immediately preceding the quoted one about recent medical treatment were all directed toward the state of Father Meinecke's *memory* and *orientation*. The record in this respect reads as follows:

"The Court. **Now, to what other extent did your memory (4793) become refreshed by your conversation with Mr. MacInnis?**

A. I was trying—I know that questions would be asked of me and I wanted to try to be direct and factual and to the point and not hedge. So the first thing we had to agree on was what year I first got to know Harry Bridges, and then——

Q. **Do you have difficulty, Father, with your memory or recollection under ordinary conditions?**

A. In Nevada there are no clocks and no calendars. We don't know one day from another, and it is easy for one to become careless about pegging dates, although I wasn't that way when I was here in San Francisco.

Q. **In San Francisco, Father, you were perfectly conversant and well oriented, weren't you, with respect to dates and the like?**

A. That's right.

Q. **Since you went to Nevada your orientation has become poor; has it?**

A. No; the years have sort of run together. I say a couple of years ago, and then I remember back, it was 15 years ago."

(R. 32-33.)

From the sequence and context of that portion of the record above quoted, it is unmistakably indicated that the question about recent medical treatment *was* a **continuation** of the subject dealt with in the preceding four questions, that is, that it was directed toward the state or condition of Father Meinecke's **mind**.

Note: that, in the questions and answers above quoted, it was Judge Harris and not Father Meinecke who **injected** and repeated the word "oriented" and "orientation", thereby *suggesting* that Father Meinecke was *mixed up and confused mentally*; that the question, "*Since you went to Nevada your orientation has become poor, has it?*" was in form and substance in the nature of an *accusation*, being *converted* into a question only by the terminal phrase "**has it.**"; and, that the word "*subjected*" in the question about recent medical treatment carried forward the same *accusation* and renewed and fortified the implication and innuendo of the words "*oriented*" and "*orientation.*"

Fourth: we call attention to the fact that between the question and the quoted remarks of appellant which Judge Harris has adjudged to constitute contempt more than a page of transcript occurs and that a part thereof reads as follows:

“The Court. There is no impropriety in my questioning.

Mr. MacInnis. I say there is.

The Court. He **asserted*** his present *memory* is not good. I asked him whether or not **his recollection** was good while he was here years ago. He said yes, **it** was years ago. **I don't see any reason for the criticism.**” (R-34.)

The latter statement by Judge Harris was made within a minute, (or, at most, a minute and a half), of the time he completed the question about being recently subjected to medical treatment, **and it was made in justification of the asking of that question.** Do not the words “**memory**” and “**recollection**” **unmistakably reveal** that, **so soon** after the quoted question was asked, Judge Harris **was thinking of it as a question directed toward the state of Father Meinecke's mind?**

Fifth: later the same day (after a mid-morning recess), Judge Harris made a statement to the jury (which we hereinafter call an apology) concerning his purpose in asking the quoted question. During the course of that statement, or apology, Judge Harris said:

“Latterly, in my examination of Father Meinecke some mention was made by counsel concerning the asserted impropriety of a question on my part to the Father. I might say to you that that was not born of any desire on my part, nor was it designed to inquire into Father Meinecke's

*Father Meinecke made no such **assertion.**

mental processes. Nor was it to reflect upon his integrity. *The question was born and conceived out of a desire on my part to accord fairness to the witness, for the reason that mention was made during the course of this testimony that he left San Francisco for Nevada; an inference might be drawn from that departure that it had something to do with activities in trade unionism and the like. The Father on the witness stand volunteered that he asked to be transferred. I merely wanted to inquire, ladies and gentlemen, a very simple question, not born of curiosity on my part, but born of a desire to provide you with all the facts surrounding the Father, and it was to the end that I might inquire as to his health. Very many people have to leave large metropolitan areas to go to less burdensome parishes and that was the reason underlying my question."*

(R. 38-39.)

The foregoing explanation will bear painstaking analysis.

A. Note the clause, *the positive statement*: "The question *was* born and conceived out of a desire on my part to accord fairness to the witness, * * *"

This statement unmistakably implied that the testimony of Father Meinecke, *as it then stood*, gave the jury ground or reason to look upon Father Meinecke *in an unfavorable light* and that the question [about being recently subjected to medical treatment], was designed to accord to Father Meinecke the opportunity to supply an *omitted fact*, which, when supplied, would explain or qualify or excuse or account for his

other testimony in such a way as to cause the jury to look upon him in a more favorable or less unfavorable light. In other words, this statement unmistakably implied that the question was intended to enable Father Meinecke *to remove or reduce* a possible or likely *misconception* about him, *arising from his testimony*, which, unless removed or reduced, *would unfavorably reflect upon him*; and which *could be removed or reduced* by a showing that he either had or had not recently been subjected to medical treatment.

In what *possible* way could a showing that Father Meinecke **either had or had not** bodily, as distinguished from mental ills, have explained or qualified or excused or accounted for his other testimony in such a way as to cause the jury to look upon him in a more favorable or less unfavorable light? In what *possible* way could a showing that Father Meinecke **either had or had not** bodily, as distinguished from mental ills, have removed or reduced a possible or likely misconception about him, arising from his testimony, which, unless removed or reduced by such a showing, would unfavorably reflect upon him?

We submit the answer to each of these questions is "**in no possible way.**"

In what *possible* way could a showing that Father Meinecke *was not mentally ill* have explained or qualified or excused or accounted for his other testimony, in such a way as to cause the jury to look upon him in a more favorable or less unfavorable light? In what *possible* way could a showing that Father Mein-

ecke **was not** mentally ill have removed or reduced a possible or likely misconception about him, arising from his testimony, which, unless removed or reduced by such a showing, would unfavorably reflect upon him?

We submit the answers to each of these questions is "**in no possible way.**"

There remains but one more alternative. In what *possible* way could a showing that Father Meinecke **was** mentally ill have *explained* or *qualified* or *excused* or *accounted* for his other testimony in such a way as to cause the jury to look upon him in a more favorable or less unfavorable light? In what *possible* way could a showing that Father Meinecke **was** mentally ill have removed or reduced a possible or likely misconception about him, arising from his testimony, which, unless removed or reduced by such a showing, would unfavorably reflect upon him?

The answer to these two questions is not "in no possible way" but is "*in one, and in **only one, possible way***" namely: If Father Meinecke was shown to be mentally deranged, and particularly if he was shown to be mentally deranged on the particular subject of his testimony, then he was not to be *considered or held to be **morally responsible** for the testimony which he had given in favor of the defense.*

This, we assert, is the **only possible way** in which an inquiry concerning either the physical or mental health of Father Meinecke **could** have **accorded fairness** to that witness. *In this respect we challenge the*

attorneys for the government to suggest any other possible way, having the least smidgeon of plausibility, in which such an inquiry could have accorded fairness to Father Meinecke.

Observe, that if this was the thought which Judge Harris had in mind, then, **at this middle stage of the trial**, he had made up his mind either (1) that the defendants were guilty of the crimes charged against them or (2) that, whether guilty or innocent, they should (for patriotic reasons) be convicted.

To say this in another way: if this was the thought which Judge Harris had in mind, then he intended, by the quoted question and by his explanation of his purpose in asking it, to tell the jury, in effect, that *if Father Meinecke was not mentally deranged he was culpable—i.e. deserving of blame or censure—for having given the testimony which he had theretofore given (in which case his testimony, being that of an evil person, should be disregarded) whereas if he were mentally deranged he should be excused for having so testified (but in such case his testimony, being that of a person who was mentally irresponsible, should be disregarded.)*

Thus: If this was the thought which Judge Harris had in mind, he was trying, by the asking of the quoted question and by his explanation of his purpose in asking it, *to induce the members of the jury to reject, for one reason or another but definitely to reject, the testimony favorable to the defense which Father Meinecke had given.*

B. But is it not possible that when Judge Harris said: "The question was born and conceived out of a desire on my part to accord fairness to the witness, * * *" he, Judge Harris, was merely "flowing at the mouth," that is, speaking words without reason behind them?

Were this the only instance of this kind we would admit to such a possibility. But this was *not* the *first time* Judge Harris, in his apology to the jury, used the word "*fairness*" with respect to the same witness, and, in the previous instance, the word "*fairness*" was used in such a way to imply that a **stigma or onus attached to a person who appeared voluntarily** as a witness for the defense in the Bridges case, and thus, in that previous instance, Judge Harris *evidenced the same character of prejudice and prejudicial purpose as that previously outlined by us.*

We have reference to the following incident:

The first question which Judge Harris asked Father Meinecke was this:

"Did you receive a subpoena to attend this court?"

(R. 31.)

The answer was in the affirmative.

Judge Harris in his "apology" stated to the jury his purpose in asking such a question as follows:

"* * * I think the first question I asked him was whether or not he was subpoenaed. That was overlooked. *I think in fairness to Father Mein-*

ecke it was a question that should have been asked, *showing his purpose in coming here.* * * *"
(R. 37-38.)

In what way *could* the asking of that question have been an act "*in fairness to Father Meinecke*"? In what *conceivable way could* an answer to that question have relieved Father Meinecke of the onus of any thought or inference or suggestion *which would have been unfair to him*—that is, which if unremoved would have reflected unfavorably upon him?

There is only one *possible plausible* answer to these questions. *And we challenge the attorneys for the Government to suggest any other answer which is in the least bit plausible.* The answer is this: that some onus or stigma attached to a person who came forth **voluntarily** to give testimony favorable to the defendants then on trial, and that by asking Father Meinecke whether he had been subpoenaed, Father Meinecke was given the opportunity, **which in fairness should have been given to him, to relieve himself of that onus or stigma by testifying that he was present under the compulsion of subpoena.**

Think this over. Examine it from every side and corner and angle and point. And when you are done, no other possible answer containing the least figment of plausibility will have occurred to you.

C. Let us go a step further to show that Judge Harris had Father Meinecke's mental health in mind when he asked the quoted question about recent med-

ical treatment. Consider this part of Judge Harris' apology to the jury:

“* * * Very many people have to leave large metropolitan areas to go to less burdensome parishes, and that was the reason underlying my question.”

Do very many people have to leave large metropolitan areas for less populous communities *to obtain more or better medical care and treatment*? Of course not. The very reverse is the case.

On the other hand, it is a matter of common knowledge that some few people—not *very many*, and not even *just plain many*, but *some few*, who have the means to do so—who suffer from *mental or nervous disorders*, leave, or are sent from large metropolitan areas to less populous communities so that they may there live less exciting lives—lives which are less taxing upon their mental and nervous resources; that is, where they will find a **less burdensome** daily routine.

Before we leave the matter of this sentence of Judge Harris' apology to the jury let it be noted that **clergymen** rather than **parishioners** find parishes either **more burdensome** or **less burdensome**, and that, as a result, when Judge Harris said “very many people”, he meant either very many clergymen, or, more probably, *very many Roman Catholic priests*. He thus singled out the class to which Father Meincke belonged, and, in effect, told the jury that **very many**—*not just some, and not just many, but very*

many—of the members of **that** class were **mentally ill**.*

In other words, in this instance Judge Harris told the jury, in effect, and by unmistakable suggestion and innuendo, that *very many clergymen, or very many Catholic priests, were of unsound mind*, and that, *in all probability, Father Meinecke was one of those very many*. That was the patent suggestion. This was the unmistakable innuendo. *And it impugned the sanity of clergymen, or of Roman Catholic priests, as a class.*

D. Here we find it advisable to retrace a bit in order to explore one of the “side streets” previously mentioned by us. By side streets we mean: matters which, on casual glance, appear to be irrelevant but which, on closer examination, are revealed to be not only relevant but quite material.

As we have hereinbefore shown, Judge Harris, in his apology to the jury, said:

“* * * The question (concerning having been recently subjected to medical treatment) was born and conceived out of a desire on my part to accord fairness to the witness, *for the reason that mention was made during the course of this testimony that he left San Francisco for Nevada; an inference might be drawn from that departure that it had something to do with activities in*

*Are the facts such as to have warranted a declaration of “judicial knowledge” to this effect? We unhesitatingly assert that they are not.

*trade unionism and the like. The Father on the witness stand volunteered that he had asked to be transferred. * * **

How, by what logical process, **could** it be inferred, from the fact that Father Meinecke had left San Francisco for Nevada, that that *departure* had *something* to do with activities in trade unionism and the like?

In no way. By no logical process.

And in what way could testimony that Father Meinecke *either had or had not* "been recently subjected to medical treatment" have *either fortified or lessened, in any degree*, an inference that his departure from San Francisco or to Nevada *either had not or* "had something to do with activities in trade unionism and the like?"

In no way. In absolutely no way.*

Thus, on casual examination, the last quoted statements of Judge Harris appear to be without point or reason, to be *non sequitur*, to be unrelated and irrele-

*Father Meinecke's departure from San Francisco apparently occurred several years prior to February 1, 1950 and in 1946 or 1947 in that he had testified that previous to the last few years he had been in San Francisco (R. 5) and that he came to San Francisco in 1936-37 and remained there approximately ten years. (R. 5 and 6.) He testified on February 1, 1950. Thus medical treatment at or prior to the time of his departure from San Francisco, would not have been *recent*. Moreover, whether Father Meinecke had ever received medical treatment would have had no bearing on whether his departure from San Francisco "had something to do with activities in trade unionism and the like".

vant. But let us take a second look, a closer look, a deeper look. *And when we do we will find point and reason and relation and relevance aplenty.*

The clue is to be found in the sentence, "The Father on the witness stand *volunteered* that he had asked to be transferred." It is the clue because it points us unerringly to the portion of the record which Judge Harris had in mind, viz.:

"Q. (By Mr. Donohue). Father, are there trade unions up in Eureka, Nevada, where you are now stationed?

A. Unfortunately, the present policy of Washington is that no mining is to be done in the Western United States. Our mines are closed. There are no jobs. My poor little parishes are suffering. So where there are no mines operating, there are no workers, there are no unions.

Q. I was wondering whether there was any reason, after your ten years' experience with the trade union movement, for your being assigned to an area in which there is no trade union movement at all.

A. A very interesting question. No connection whatsoever, and I forgive you for the slur.

Q. I didn't ask for forgiveness, and I meant no slur. I asked you a question. You understand that this is a court of law. (4787)

A. Yes sir. My superiors always gave me loyal backing and approval and urged me to take an interest in the trade union movement and in the problems and knowing these people and being helpful to them. My superiors approved of that fully and gave me full encouragement.

Q. And it was your superiors who moved you to Eureka, Nevada?

A. No, I requested it. The records show that."
(R. 26, 27.)

In view of this testimony, and in the absence of any evidentiary showing to the contrary, [and there was no evidentiary showing to the contrary], there was *absolutely no basis* for an *inference* that Father Meinecke's departure from San Francisco, to Nevada, "had something to do with activities in trade unionism and the like."

It is true, unmistakably true, that Mr. Donohue, by his four questions, tried to **plant** such a thought in the minds of the jury, *not only as being a possibility but as being an actuality*. But Mr. Donahue's questions *did not constitute evidence* to serve as basis for an inference such as Judge Harris, in his apology to the jury, said "*might be drawn*"; and the evidence, **the only evidence**, on that subject was diametrically opposed to the drawing of such an inference.

Judge Harris, in stating to the jury that such an inference "*might be drawn*", in practical effect **elevated** the assertions and suggestions contained in the questions of Mr. Donohue to the level of evidence. Such statement, in effect, told the jury *that there was evidence before them sufficient to sustain such an inference*. And what was that inference. That Father Meinecke *had been moved* from San Francisco to Nevada by his superiors because of his "*activities in trade unionism and the like*."

E. Now consider this inference, *which Judge Harris told the jury they might draw*, in connection with the suggestion and innuendo of Judge Harris with relation to probable insanity of Father Meinecke, as being parts of "**all the facts** surrounding the Father" with which Judge Harris said **he desired "to provide"** the jury.

What do we find?

We find the suggestion—subtle, it is true, but clearly present—that Father Meinecke was, by his superiors, transferred from San Francisco to Nevada because, *in their judgment*, he had the irrational thought or insane delusion that Harry Bridges and other left-wing labor leaders in San Francisco (which they, the superiors of Father Meinecke, deemed to be Communists or fellow travelers of Communists) were not in fact Communists or fellow travelers of Communists but were only *militant trade unionists*.* We find the suggestion that the *superiors of Father Meinecke found him to be mentally cracked and talkative on this one subject* and that they removed him from San Francisco, where he could do great injury (by expressing his opinions on this subject) to the crusade which the Roman Catholic Church was making against Communism and Communists, and **exiled him** to the ghost mining camps, mountains and deserts of Nevada, there to minister to sheep herders and Indians, where his talking about "trade unionism and the like" could do no harm.

*Father Meinecke had testified that in his opinion Bridges was merely a militant trade unionist. (R. 16.)

Be it observed that this explanation of the inference which Judge Harris said "might be drawn" fits in perfectly with and fortifies and furthers the explanation which we have given concerning the way in which inquiry concerning the mental health of Father Meinecke *could accord fairness* to Father Meinecke, and that both of these explanations fit in perfectly with and fortify and further the explanation which we have given concerning the way in which the inquiry as to whether Father Meinecke was subpoenaed *could accord fairness* to Father Meinecke. The course of Judge Harris in these respects *was as consistent as it was persistent, and it was closely knit*. This persistency and consistency and close knitting combine to negative, as a **possible explanation**, the thought that Judge Harris was merely bumbling and stumbling through words the meanings and implications of which he did not comprehend; they combine to negative, as a **possible explanation**, the thought that there was present merely an unfortunate series of slips of either mind or tongue. **Purpose—calculated purpose—is unmistakably revealed.**

F. And what was that purpose? To answer this in the fullness which it deserves we must consider the background.

The Roman Catholic Church is notoriously known to be an implacable and vociferous foe of Communism, Communists, and everything and everyone having a tendency in that direction. The gravamen of the charge against the defendants was that Bridges was a member and active agent of the Communist

Party. Father Meinecke was a Roman Catholic Priest. For ten years he had headed in San Francisco the Association of Catholic Trade Unionists. The Association of Catholic Trade Unionists was an instrument of the Roman Catholic Church organized specifically at the wishes of Pope Pius XI (R. 8) to combat Communism in labor unions (R. 44). Father Meinecke had, during those ten years, been in close contact with Bridges. He had heard the rumors and such that Bridges was a Communist. He had made it his business to investigate that very matter to get the truth of it (R. 14). He had discussed Bridges with many persons who knew him at close range and were not basing their judgments of the man on hearsay and the like. Based on such discussions and his own studied judgment he testified he knew the general reputation of Bridges in San Francisco for truth, honesty and integrity and that it was good. *On cross-examination* it developed that Father Meinecke was of the opinion that Bridges was not a Communist but merely a militant trade unionist (R. 16). In answer to a question *on cross-examination* he testified:

“Mr. Donohue, as a Catholic priest, if I had the slightest notion that Harry Bridges was a Communist, I would not be here. If I had any suspicion whatsoever that he was, I would not be sitting here or his friend.” (R-16)

This testimony of Father Meinecke was like a bomb exploding in the heart of the prosecution's case. *It was like the testimony of a recording angel in favor of a person on trial for a heresy which he denied.*

Unless in some way discredited, it did great and inestimable damage to the case of the prosecution.

And what was the revealed purpose of Judge Harris? *To discredit that testimony. To destroy it in the minds of the jury. To deprive the defendants of its benefit.* And to do so, not by any attack upon the honesty or sincerity of Father Meinecke, but by *telling the jury, in effect, that among the facts "surrounding the Father" which he, Judge Harris, had a "desire to provide" to them, was the fact that Father Meinecke was crazy at least on the one subject, the particular subject, on which he testified; and that it was because his superiors had years before discovered that he was crazy on this one subject that he was now stationed in Nevada rather than in San Francisco.*

G. Particular attention should be given to this sentence in Judge Harris' apology to the jury:

"I merely wanted to inquire, ladies and gentlemen, a very simple question, *not born of curiosity on my part, but born of a desire to provide you with all of the facts surrounding the Father,* and it was to the end that I might inquire as to his health."

The clause "not born of curiosity on my part" in juxtaposition to the clause "but born of a desire on my part to provide you with **all of the facts surrounding the Father**" clearly and unmistakably implied that Judge Harris *knew what all of the facts were surrounding the Father and had no reason to be curious.* In other words these two clauses gave to the

suggestion and innuendo of Judge Harris that Father Meinecke was of unsound mind the practical effect of *unsworn but positive testimony of Judge Harris* that Father Meinecke was *in fact, to Judge Harris' knowledge, of unsound mind.*

Now let us get back to the Certificate of Judge Harris. We have heretofore said,

“If by the term ‘physical well-being’ Judge Harris intended to convey the thought of bodily health, as distinguished from mental health, this recitation in the Certificate is demonstrably false, or, in other words, it is not only not supported by the record but the record, and particularly the record of Judge Harris’ own words, proves that it is false.”

We think we have shown to the point of demonstration, in the sections which we have designated *First* to *Fifth* and under *Fifth* have lettered A to G, that Judge Harris had Father Meinecke’s mental health, as distinguished from his bodily health, in mind when he asked the question about recent medical treatment.

TWO.

Now the question arises: Did Judge Harris make the statement, “directed toward the physical well-being of the witness” in the Certificate with the idea of inferentially denying that the question was directed toward the mental health of Father Meinecke?

Could such declaration in the Certificate have served *any purpose* had it **not** been intended *to point away*

from the question of mental health? We can think of no such purpose.

Conversely, if such declaration were intended to point away from the question of mental health, we can think of a very important purpose which such a declaration could have served.

The following appears on pages 80 and 81 of the Record:

“(Title of District Court and Cause.)

EXCERPTS FROM THE TESTIMONY IN NO. 32117-H

UNITED STATES OF AMERICA VS. HARRY RENTON BRIDGES,
HENRY SCHMIDT AND J. R. ROBERTSON.

Before: Hon. George B. Harris, Judge.

Wednesday, December 21, 1949

Paul Crouch

witness for the Government.

Cross-Examination

By Mr. Hallinan:

* * * * *

Q. Have you been in any institution for nervous or mental disorders?

Mr. Donohue. Oh, I object, if Your Honor pleases. That is a wholly improper question.

Mr. Hallinan. It is entirely proper to find out of this witness' mental background.

Mr. Donohue. *There is a rule of law, if Your Honor pleases, that no witness may be asked any question the answer to which may tend to degrade him. That is the only purpose for which this shot in the dark could be asked of this witness by Mr.*

Hallinan. After all, a witness is entitled to some consideration.

The Court. *The* objection is sustained. (Emphasis added.)

* * * * *

Thursday, January 12, 1950.

Lewis Herbert Michener, Jr.,

witness for the Government.

Cross-Examination

by Mr. MacInnis:

Q. Do you know a man named Dr. Ernest Cohen?

A. I believe I do, sir. I do know a doctor by that name.

Q. He is a psychiatrist in Beverly Hills, isn't he?

A. That's correct, sir.

Q. And he has treated you for mental illness in 1944, hasn't he?

Mr. Paisley. Oh, Your Honor——

The Court. The objection is sustained.

* * * * *

(R. 80-81.)

Observe that the Crouch ruling occurred approximately five weeks prior to Father Meinecke's appearance on the witness stand, and that the Michener ruling occurred just over two weeks prior to Father Meinecke's appearance on the witness stand.

From the foregoing, we see that if Judge Harris' question to Father Meinecke about recent medical treatment was directed toward the mental health of

Father Meinecke, *Judge Harris asked that question in disregard and defiance of his own previous repeated rulings.* We have hereinbefore shown that Judge Harris' question to Father Meinecke about recent medical treatment was directed toward the mental health of Father Meinecke.

Moreover, that question was asked by Judge Harris not only in disregard and defiance of his own previous repeated rulings, but he was asking that question of a **defense witness** where he had, by such previous rulings, prevented defense counsel, **including appellant**, from asking the same character of question of **prosecution witnesses**.

Nor is this all. Such rulings were to the effect that such a question was improper because "**the answer * * * might tend to degrade**" the witness, and that the "*only purpose for which*" such a question "**could be asked**" was to obtain an answer which would **degrade the witness**. We say that this was the effect of those previous rulings because in the first, or Crouch, incident, Judge Harris said "**The** objection is sustained"; because the **only** objection made in that instance was to the above stated effect; and, because in the second, or Michener, incident, Judge Harris sustained "**the** objection" without the "objection" having been stated, *except as it was stated in the Crouch incident*.

Here we need to explore another of the converging avenues to reveal the full effect of such—shall we say—inconsistency on the part of Judge Harris.

On November 22, 1949, during the early stage of the same trial, Judge Harris adjudged Vincent Hallinan guilty of criminal contempt of Court, and sentenced him to six months' imprisonment. (R. 83.)

Said judgment of contempt was appealed to this Court. (R. 84). This Court affirmed that contempt judgment. (*Hallinan v. U.S.A.*, 182 Fed. (2d) 880.) The criminal contempt in that case consisted of making statements and asking questions assertedly in disregard and defiance of previous rulings of Judge Harris during the trial of the case of *U. S. v. Bridges et al.*

Thus, under the precedent set by Judge Harris in adjudging Vincent Hallinan guilty of contempt of Court (as later sustained by this Court), *Judge Harris was himself guilty of criminal contempt of court* in asking Father Meinecke the question about recent medical treatment **if** that question was directed toward the *mental health* of Father Meinecke.* As we have seen, that question was so directed.

In other words, **if** the declaration of Judge Harris in the Certificate that the quoted question to Father Meinecke was "directed toward the physical well-being of the witness" was intended by Judge Harris to point away from the question of mental health, *the purpose which could have been served thereby was to*

*That is, if, in this situation, "sauce for the goose is sauce for the gander". In this respect we say that in our judgment, the responsibility, and therefore in the event of a failure to discharge the responsibility, the culpability, of the judge is greater than that of the advocates.

*set up a judicial finding or a pronouncement, contrary to the truth, to prevent appellant from showing, in his own defense upon this appeal, the fact of misconduct and criminal contempt of court, and the extent of misconduct and criminal contempt of court, of Judge Harris in asking the quoted question of Father Meinecke.**

THREE.

Now let us again return to the Certificate of Judge Harris.

Attention is called to the fact that the Certificate does not quote what occurred between the asking of the quoted question by Judge Harris, and the making of the statements by appellant which Judge Harris adjudged to constitute contempt. The omission of such material from the Certificate gives or leaves the suggestion or impression, *if it does not overtly infer*, that appellant's remarks were directed, *and directed solely*, to the asking of the quoted question by Judge Harris.

Such was not the case. Indeed, appellant's remarks were directed more toward something else. *More toward a new and further act of misconduct on the part of Judge Harris than they were toward the asking of the quoted question.* They were directed more to-

*Inasmuch as it was a foregone conclusion that appellant would appeal to this court. Moreover, if such were the purpose of Judge Harris, then declaration was made in the certificate with the intention of thereby deceiving the members of this court and of inducing them to decide the appeal against appellant on an untrue factual basis.

ward certain statements made by Judge Harris **between** the asking of the quoted question and the quoted remarks of appellant, concerning which statements of Judge Harris the Certificate of Judge Harris makes no mention. This we will presently show.

FOUR.

Before doing so, however, let us pause to point out that even had the remarks of appellant been directed *solely* toward asking of the quoted question, they would have been *entirely justified*.

They would have been justified because the asking of the quoted question constituted misconduct on the part of Judge Harris. Misconduct amounting to criminal contempt of court. *For this, Judge Harris should have cited himself not only for misconduct, but for criminal contempt of the tribunal over which he was then presiding.* For this, Judge Harris should have been ashamed of himself.

FIVE.

But was appellant, at the time he made his remarks, sufficiently aware, from things which had already occurred, of Judge Harris' purpose in asking the quoted question, to give appellant justification for making those remarks?

He was.

A. Appellant **knew** that the quoted question had relevance only if it had relation to Father Meinecke's *mind* as distinguished from his *body*. Appellant **knew**

that the quoted question was in *continuation* of the four immediately preceding questions *and that each of those four questions had relation to Father Meinecke's mind as distinguished from his body*. Appellant sensed the implication in the word "**subjected**", and *knew* from that, that the quoted question had relation to Father Meinecke's **mind as distinguished from his body**. Appellant **knew** of the previous rulings of Judge Harris in the Crouch and Michener incidents and thus **knew that the quoted question was being asked in disregard and defiance of those previous rulings**. And appellant **knew** that during the course of the same trial Judge Harris had adjudged Vincent Hallinan **guilty of criminal contempt** of court for having assertedly asked questions *of a prosecution witness in disregard and defiance of previous rulings of Judge Harris*.

Here we need to shift to another of the converging avenues.

B. Just as Judge Harris' statement in his apology to the effect that the quoted question was "not born of curiosity on my part, but born of a desire to *provide* you with *all* of the *facts* surrounding the Father" intimated to the jury that Judge Harris had knowledge or information concerning what those facts were, so also the questions which Judge Harris asked Father Meinecke were in such terms and sequence as to convey to the jury (and to all spectators) that Judge Harris was not fishing in the dark or about matters concerning which he had no information but that he

knew what answers should be given, to be truthful, and that those answers, in some way, reflected upon the credibility of Father Meinecke.

The first question—the one about being subpoenaed—by hitting the nail squarely on the head, gave forth such an intimation. Then followed these questions and answers:

Q. Did you arrive here today, Father, this morning?

A. I came in yesterday.

Q. Have you had any discussions before taking your place on the witness stand with any persons?

A. Yes, I spoke to Mr. MacInnis. (4792)

Q. At his office?

A. Not at his office; at his home.

Q. At his home. When did you meet at his home, Father?

A. Last evening.

Q. Did you have dinner there at his home?

A. That is correct, * * *.

(R. 31.)

To all present who heard these questions and answers it became apparent that Judge Harris had foreknowledge (1) that Father Meinecke had arrived in San Francisco the day before, (2) that he had met appellant not at his office but at his home, (3) that he had met appellant in the evening rather than in the daytime, and (4) that he had had dinner in appellant's home. The fact that Judge Harris had elicited these matters so quickly, so unerringly and

with so little lost motion, negatived the thought that he had been fishing in unseen waters.*

Next we come to the series of five questions, hereinbefore set out, about memory, orientation and medical treatment. The very form of the two questions: "In San Francisco, Father, you were perfectly conversant and well oriented, *weren't you*, with respect to dates and the like?," and "Since you went to Nevada your orientation *has* become poor, has it?", indicated that Judge Harris knew that each should be answered in the affirmative, while the injection of the word "oriented" in the one and the word "orientation" in the other contain the same suggestion.

In this connection it should be realized that Judge Harris' departure, *in this one instance*, from his prac-

*The next question asked by Judge Harris,

"* * * After you *spent the evening there and enjoyed the social activities*, then you had a discussion concerning the testimony that might be given in this case?" (R. 32),

indicated what purpose Judge Harris had in mind in asking this series of questions. It was to show the jury that appellant and Father Meinecke had a relationship other than that of attorney and witness; a *social or fraternal* relationship—a friendship such as Father Meinecke had testified he had with Bridges—and *that, figuratively speaking, Bridges, appellant and Father Meinecke were as three cards out of the same deck, having different faces but the same back, substance and texture. In other words, it was to suggest that Father Meinecke was something less than a free, independent, and responsible witness and that, while the voice was his, the words were appellant's and the testimony was that of Bridges himself.*

[As a matter of fact, Father Meinecke performed the marriage of appellant and his wife and baptized each of their three children; and appellant and Bridges were barely acquainted prior to the filing of the indictment. While these facts do not appear of record we deem it permissible to mention them in this footnote to show that there was no basis in fact for the suggestion given forth by Judge Harris by this series of questions.]

tice of *not* cross questioning witnesses (R. 22), was, *in and of itself*, an event charged with the *excitement of anticipation*, the anticipation being that exciting facts, bearing on the credibility of Father Meinecke, *were about to be disclosed*.

This *suggestion of foreknowledge* was insidious in the extreme. It made the quoted question, "Have you been recently subjected to medical treatment, Father?", at once both a *rapier* and a *bludgeon*. A *rapier* if it brought forth an affirmative answer; a *bludgeon* (of unsworn testimony by Judge Harris) if it did not.

This is how appellant regarded that question. This is how appellant was entitled, in reason, to regard that question.

C. Appellant's judgment concerning the purpose of Judge Harris in asking the quoted question finds support in this further circumstance:

The incident in this case—commencing when Father Meinecke began his testimony and ending when Judge Harris concluded his apology to the jury—amounts to approximately *one, two hundred fiftieths* of the trial record of the Bridges case. As the Crouch and Michener rulings indicate, and as anyone with the least bit of acumen would naturally assume, a judge who went so far out in attempting to aid the prosecution and injure the defense as Judge Harris did in this incident was not likely to have displayed strict judicial impartiality throughout the other *two hundred forty-nine, two hundred fiftieths* of the trial. Appel-

lant did not have to make any such assumption. He knew what Judge Harris' conduct had been during the preceding stages of the trial. As a result, appellant did not have to be either clairvoyant or prescient to make a quick and accurate judgment concerning what Judge Harris' purpose was in asking Father Meinecke the question, "Have you been recently subjected to medical treatment, Father?" Appellant would have had to have been completely void of sense and sensibility, and of memory and comprehension, not to have made a quick and accurate judgment concerning that purpose. In this connection it is interesting to note that, to appellant, Judge Harris' apology came as an *anti-climax*, as is clearly indicated by the fact that appellant, in voicing objection to that apology after it was made, could find nothing stronger to say than that it had "the total effect of adding injury to injury" and that "the explanatory remarks are *at least partially as improper* as the ones originally made." (R. 59.)

We have shown (we believe) to the point where this Court will be entirely satisfied, that even had the remarks of appellant been directed solely toward the asking of the quoted question they would have been *entirely justified*, by the matters *then known* to appellant.

THREE (Continued)

As we have hereinbefore stated, the remarks of appellant were not directed *solely* to the asking of the quoted question but *mainly* to conduct of Judge Harris subsequent to the asking of that question.

Now let us see what occurred between the asking of the quoted question by Judge Harris, and the making of the remarks by appellant which Judge Harris adjudged to constitute contempt. The record in this respect reads as follows:

“Q. Have you been recently subjected to medical treatment, Father?

Mr. Hallinan. If the Court please, I am going to object to these questions.

Mr. MacInnis. Let me in.

Mr. Hallinan. I want to enter a legal objection. Your (4794) Honor has seen the Manning Johnsons, the *Crouches*, the Rosses, and everybody get on that stand and we asked *whether they were insane or not*. I object to your Honor's question. *I object to that last question* and assign that as misconduct, and I ask that the jury be instructed to ignore the implication of *the question*.

The Court. There is no occasion for any admonition to the Jury. *Mr. MacInnis invited it*.

Mr. MacInnis. *I never heard of such a question*.

The Court. *Mr. MacInnis invited me to ask the question*.

Mr. MacInnis. Your Honor refused to do that and I asked a question.

The Court. I have the greatest respect for men of the cloth, as we all have.

Mr. MacInnis. You are demonstrating it.

The Court. There is no impropriety in my questioning.

Mr. MacInnis. I say there is.

The Court. He asserted his present memory is not good. I asked him whether or not his

recollection was good while he was here years ago. He said yes, it was good years ago. I don't see any reason for the criticism.

Mr. MacInnis. When one of the prosecution witnesses was on the stand we asked him if he had received medical treatment, and now you ask a priest who comes here and gives testimony the same question. (4795.)

The Court. Ladies and gentlemen——

Mr. MacInnis. I think you should cite yourself for misconduct.

The Court. Ladies and gentlemen——

Mr. MacInnis. I have never heard anything like that. You ought to be ashamed of yourself.

Mr. Donohue. If your Honor please, could I ask your Honor to recess at this time and ask the Father to remain until after the recess period?"*

(R. 33-34.)

It will be observed from the context and sequence of what occurred that appellant's remarks were directed more to the statement of Judge Harris that appellant had invited Judge Harris to ask the quoted question than they were to the asking of that question. The following two statements of appellant reveal that this is so. "I have never heard of such a question," and "I have never heard anything like that."

*By this "timely" motion for a recess, Mr. Donohue revealed that he realized that, in the exchange with appellant, Judge Harris was getting himself farther and farther out on a limb and that appellant was sawing deeper and deeper into that limb where it joined the trunk.

The statement of Judge Harris that appellant had invited him to ask "**the** question" was **absolutely false**. *Even worse still: although absolutely false, the circumstances were such that, in all probability, it appeared to the jury to be a truthful statement.*

Here it becomes necessary for us to explore another of the converging avenues.

At one point during the examination of Father Meinecke, Mr. Donohue, the Chief Prosecutor, moved the Court to strike the testimony of the priest on the ground that his testimony concerned his own personal opinion of Bridges, and not the general reputation of Bridges, *and hence was legally inadmissible*. In replying to that motion, appellant made this statement:

"* * * I will invite your Honor to ask the witness if the answer he gives is not a composite of his own knowledge of the man plus what other people in the community have said."*

(R. 21.)

That was the *only invitation* extended by appellant to Judge Harris to question Father Meinecke.

.Judge Harris replied to this invitation as follows: "Mr. MacInnis, you are counsel for several of the defendants. You may ask him that if you are so advised." (R. 21.) " * * It is not the province of the court to examine the witness. You ask the questions if you like." (R. 22.) It is revealingly interesting to observe that when invited by appellant to ask this question, the asking of which by Judge Harris would have been of benefit to the defense, Judge Harris refused, but that as soon as Mr. Donohue said: "I have no further questions of the witness", Judge Harris said: "One question, Father Meinecke" (R. 31) and then proceeded to question the priest on behalf of the prosecution in the way hereinbefore exposed.

It was **not** an invitation to question Father Meinecke *about his health, whether physical or mental*. It was **not** even an invitation to question Father Meinecke **generally**. It was an invitation to put a single question to Father Meinecke on a limited, specific, defined subject *which had no relation to the subject of Father Meinecke's bodily or mental health*.

In all probability, the jury remembered the incident of this invitation, but did not remember, or even at the time the invitation was extended did not realize, that it was limited to a single specific defined subject matter. It is for this reason that we say that the circumstances were such that, in all probability, the statement of Judge Harris that appellant had invited the quoted question about recent medical treatment *appeared to the jury to be a truthful statement, whereas, as a matter of record fact, it was absolutely false*.

Now let us ask why Judge Harris found it necessary or convenient to declare in the presence of the jury that appellant had invited the question. We think the reason and the purpose of Judge Harris in this respect is unmistakably apparent, viz.: (1) Judge Harris knew that by his previous rulings he had repeatedly prevented counsel for the defense from questioning prosecution witnesses concerning possible mental illness; (2) Judge Harris realized that in all probability the jury remembered that he had made such rulings; (3) The objection of Vincent Hallinan just then made recalled such rulings

to the jury's attention; (4) Thus Judge Harris found himself in an extremely embarrassing position with respect to the jury, that is, in the position of himself having asked of a defense witness a question of a character which he had theretofore repeatedly held to be improper when asked of prosecution witnesses; and (5) **That Judge Harris made the statement that appellant had invited the question in an attempt and for the purpose of saving his own face with the jury, that is, in an attempt to conceal from the jury the fact that he had asked the quoted question in disregard and defiance of his own previous ruling.**

Is there any other possible explanation which is in the least bit plausible? We can think of none. *And, again, we challenge the attorneys for the Government to suggest such an explanation if they can so much as imagine one.*

When Judge Harris declared that appellant had invited the question, he knew that that declaration was false. No matter how faulty his memory, Judge Harris could not have been mistaken in this respect. His memory might possibly have slipped a cog to the extent of remembering appellant's invitation as being an invitation to question Father Meinecke generally, but it could not have stripped its gears completely, that is, to the extent of remembering appellant's invitation as being one *to ask the Father about his mental or physical well-being.*

And note this: Judge Harris first said "Mr. MacInnis invited it"; appellant then said "*I never heard of such a question*"; and Judge Harris then in response to appellant's specific disavowal, declared:

"Mr. MacInnis invited me to ask the question."

"* * * the question".

Not "*questions*." Not "*a question*." but

"* * * the question".

SIX.

What was appellant to think when suddenly confronted with this falsehood, coupled with this attempt to shift the blame from Judge Harris, on whom it belonged, to and upon appellant, upon whom it did not belong?

What was appellant to do? What was he to say in an attempt both to save the record and to reveal to the jury that such declaration and accusation by Judge Harris was untrue? What was appellant to do to save both the record for appeal and at the same time to save his clients from the injury which they would suffer in the minds of the jury should such falsehood and false accusation go unchallenged?

Appellant had no time to study the matter. He had no time to reflect, or to analyze, or to deliberate, or to choose carefully his words. He had to act immediately. He had to grasp and utter the thoughts and words which first came into his mind. He had to repel at once this flank attack—indeed, he had to

repel at once this two pronged stiletto attack from his rear.

That Judge Harris should have cited himself for misconduct for attempting to foist this falsehood upon the jury is manifest. That he should have been ashamed of himself for so doing is also and equally manifest. His act was that of an unfair judge covertly acting as a prosecutor. His act was that of attempting to influence the jury against the defendants, and thereby procure their conviction, and then, when his devious design was about to be exposed, of foisting a deliberate falsehood upon the jury in an attempt to block and smother such a disclosure. We repeat, Judge Harris should have cited himself for misconduct. Indeed, he should have cited himself for criminal contempt of Court. And he should have been ashamed of himself.

SEVEN.

But should appellant have declared these two things in the presence of the jury? Should he have been content to make merely a formal assignment of misconduct to preserve the record for appeal, thereby permitting the nefarious purpose of Judge Harris to succeed? Or should appellant have attempted, as he did attempt, albeit ineffectively, to prevent the weight of the District Court of the United States from being thrown into the scales of justice against the defendants to procure their conviction at the hands of the jury?

Cooley in his work on Constitutional Limitations, Eighth Edition, in the chapter on Protection To Personal Liberty, says, on page 703:

“Having once engaged in a cause, the counsel is not afterwards at liberty to withdraw from it without the consent of his client and of the court; and even though he may be impressed with a belief in his client’s guilt, it will nevertheless be his duty to see that a conviction is not secured contrary to the law. The worst criminal is entitled to be judged by the laws; and if his conviction is secured by a means of a perversion of the law, the injury to the cause of public justice will be more serious and lasting in its results than his being allowed to escape altogether.”

To such text there is added this footnote:

“There may be cases in which it will become the duty of counsel to interpose between the court and the accused, and fearlessly to brave all consequences personal to himself, where it appears to him that in no other mode can the law be vindicated and justice done to his client; but these cases are so rare, that doubtless they will stand out in judicial history as notable exceptions to the ready obedience which the bar should yield to the authority of the court.”

The footnote continues much beyond the point which we have quoted, setting forth an example of justifiable defiance of Court by counsel, by Lord Erskine, the famous English barrister, and making reference to a similar justifiable defiance of Court by counsel, by Mr. Samuel Dexter, the celebrated Ameri-

can counsel, as set forth in Story on the Constitution (4th Ed.) p. 1064. But we have quoted enough from Cooley to make our point. It is this: if **ever there were an instance where it became** "the duty of counsel to interpose between the court and the accused, and fearlessly to brave all consequences personal to himself, where it appears to him that in no other mode can the law be vindicated and justice done to his client", such an instance was present in this case in this instance.

Appellant attempted to discharge precisely that duty. It is true that he did so more with courage than effect. It is true that in appellant's hurried statements he *accused* Judge Harris rather than *revealed* Judge Harris' fault. Perhaps, had the exchange between Judge Harris and appellant not been interrupted so quickly by Mr. Donohue's motion for a recess (**which was grasped with great alacrity by Judge Harris**), appellant would have succeeded in passing from accusation to revelation.*

It is because, and solely because appellant rightfully and properly attempted to discharge this duty, that he was adjudged guilty of criminal contempt of Court, and was sentenced to three months in prison.

*It so happens that appellant's statements did have effect in so far as preserving a record on appeal in the *Bridges* case was concerned, for his statements had the effect of inducing Judge Harris to make an apology to the jury, in which apology he unmistakably revealed nefarious purposes which this Court would not have attributed to any U. S. District Judge, in the absence of such a disclosure of such purposes as Judge Harris made in his apology to the jury.

The punishment is being visited upon appellant not because of any wrongdoing on his part, but because he had the courage to attempt immediately to expose the wrongdoing of Judge Harris so that his clients should not be wrongfully and unfairly convicted.

EIGHT.

Before concluding our argument on this point, we wish to make a personal statement. We regret that we have found it necessary to say the things which we have said against one who occupies one of the highest offices in the Government of our nation. We would not have said such things (in this tribunal as distinguished from the tribunals in which impeachments of Federal officers are brought and tried) had we not thought it necessary for us to do so to adequately present the defense which appellant has. Nor would we have made the charges which we have made had there been any vestige of doubt in our mind on either of two things, viz.: (1) that the charges were in fact true, and (2) that their truth clearly and unmistakably appeared in the record.

Our task has been an unpleasant one. And it has been a difficult one in that we have redrafted the foregoing argument time after time, in an attempt to be moderate without weakening appellant's defense. But the more we labored, the more we came to the conviction that the argument which we have made should be made in order to make crystal clear and diamond sharp the fact, the nature, and the

extent of appellant's justification. We regret we present such issue for this Court's consideration and determination. But that issue has not been of our making: it was presented to us by Judge Harris. We have had no alternative but to face it and to pass it along to this Court.

To state this matter in another way: we find ourselves in the position of a physician who, in order to save his patient, must cut open, and probe, and excise, a foul and festering wound inflicted upon him by another. We have performed such an operation in this brief, not because we have found it pleasant to do so, but because we have found it necessary and our duty to do so.

It is not our desire to give offense or to be offensive. It is our purpose to defend—to present the defense which appellant has—and to do so as forcefully and as convincingly as lies within our skill, employing only the ammunition which Judge Harris has placed within our reach.

NINE.

In concluding our argument on this point, permit us to express our conviction that appellant is entitled not only to a reversal of the judgment and sentence but to vindication, and that vindication will not be his if the judgment and sentence are reversed solely on one or more points of jurisdiction and procedure. Calumny is difficult to combat and it has a propensity to grow and increase until it is turned back upon itself; aye, even after it is turned back upon itself.

Appellant has suffered, in his practice and in his social relations **and in other ways**, as a result of the calumny placed upon him by the present judgment. He is entitled, in fairness and justice, to all the relief which this Court can give him. He is entitled to a decision in which his justification is fully stated.

**APPELLANT'S SECOND, THIRD, FOURTH, AND
FIFTH POINTS.**

SECOND. THAT THE DISTRICT COURT LOST AUTHORITY AND JURISDICTION TO PUNISH APPELLANT UNDER RULE 42(a), FEDERAL RULES OF CRIMINAL PROCEDURE, BEFORE, AND LONG BEFORE, IT UNDERTOOK TO IMPOSE PUNISHMENT UPON APPELLANT.

THIRD. THAT BECAUSE THE DISTRICT JUDGE DID NOT CERTIFY THAT THE CONDUCT OF APPELLANT DISRUPTED, THREATENED TO DISRUPT OR TENDED TO DISRUPT, OR, EVEN, WAS INTENDED TO DISRUPT THE ORDERLY PROCESS OF THE COURT, THE DISTRICT JUDGE DID NOT HAVE AUTHORITY OR JURISDICTION TO "SUMMARILY PUNISH" APPELLANT UNDER RULE 42.

FOURTH. THAT THE RECORD OF THE PROCEEDINGS AT THE TIME OF THE PRONOUNCEMENT OF SENTENCE AND JUDGMENT SHOW THAT THE SENTENCE OF THREE MONTHS' IMPRISONMENT WAS IMPOSED NOT SOLELY BECAUSE OF THE ALLEGED ACTS OF CONTEMPT RECITED IN THE CERTIFICATE BUT WAS IMPOSED IN INSEVERABLE PART AS PUNISHMENT FOR UNIDENTIFIED AND UNSPECIFIED ACTS OF APPELLANT CONCERNING WHICH NO CERTIFICATE IN CONFORMITY WITH RULE 42(a), FEDERAL RULES OF CRIMINAL PROCEDURE, WAS MADE OR FILED AND THAT THE DISTRICT COURT HAD NO AUTHORITY OR JURISDICTION TO IMPOSE A PUNISHMENT ON APPELLANT UNDER RULE 42(a) AFORESAID WHICH WAS, EITHER IN ITS ENTIRETY OR IN INSEVERABLE PART, FOR ACTS CONCERNING WHICH NO CERTIFICATE IN CONFORMITY WITH RULE 42(a) AFORESAID HAD BEEN MADE AND FILED.

FIFTH. THAT THE SENTENCE OF THREE MONTHS' IMPRISONMENT IS EXCESSIVE.

[To avoid repetition of argument and of quotations of authority we herewith combine our discussion of points two to five inclusive. We do so without waiving any point for we feel that each one in and of itself is sufficient to require a reversal.]

The Supreme Court in

In re Oliver, 333 U.S. 257

decided March 8, 1948, said, on page 275:

“Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court’s business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where **immediate punishment is essential** to prevent ‘demoralization of the court’s authority’ before the public.”

Let us repeat: “* * * and where **immediate punishment is essential** to prevent ‘demoralization of the court’s authority’ before the public.”

In the case of

Cooke v. United States, 267 U.S. 517

decided April 13, 1925, the Supreme Court on pages 534 and 535 said:

“To preserve order in the court room for the proper conduct of business, *the court must act instantly* to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need

of evidence or assistance of counsel before punishment, because the court has seen the offense. Such *summary* vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law. Such a case had great consideration in the decision of this Court in *Ex parte Terry*, 128 U.S. 289. It was there held that a court of the United States upon the commission of a contempt in open court might upon its own knowledge of the facts without further proof, without issue or trial, and without hearing an explanation of the motives of the offender, *immediately* proceed to determine whether the facts justified punishment and to inflict such punishment as was fitting under the law."

On page 536 the Supreme Court said:

"We think the distinction finds its reason not any more in the ability of the judge to see and hear what happens in the open court than in the danger that, unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the "very hallowed place of justice," as Blackstone has it, is not **instantly suppressed and punished**, demoralization of the court's authority will follow. Punishment without issue or trial was so contrary to the usual and ordinarily indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court was required to justify the exception; but the **need for immediate penal vindication** of the dignity of the court **created it.**"

And on page 537 the Supreme Court said :

“The proceeding in this case was not conducted in accordance with the foregoing principles. We have set out at great length in the statement which precedes this opinion the substance of what took place before, at and after the sentence. The first step by the court was an order of attachment and the arrest of the petitioner. It is not shown that the writ of attachment contained a copy of the order of the court, and we are not advised that the petitioner had an exact idea of the purport of the charges until the order was read. In such a case, and **after so long a delay**, it would seem to have been proper practice, as laid down by Blackstone, 4 Commentaries, 286, to issue a rule to show cause. The rule should have contained enough to inform the defendant of the nature of the contempt charged. See *Hollingsworth v. Duane*, 12 Fed. Cases 367, 369. Without any ground shown for supposing that a rule would not have brought in the alleged contemnors, it was harsh under the circumstances to order the arrest.”

The “so long” delay in the *Cooke* case was one of **eleven days** (Ibid p. 521) as contrasted with the delay in this case of **twenty-eight days** before Judge Harris adjudged appellant to be guilty of contempt and of **sixty-two days** before Judge Harris **imposed punishment**.

Rule 42 Federal Rules of Criminal Procedure (prescribed under authority of Act of November 21, 1941, C 492, 18 U.S.C.A. Sec. 689, and therefore having the effect of a statute) reads as follows:

“Rule 42. Criminal Contempt

“(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

“(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant’s consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.”

The note of the Advisory Committee on Rules for subdivision (a) of this rule reads as follows:

“This rule is substantially a restatement of existing law. *Ex parte Terry*, 128 U.S. 289; *Cooke v.*

United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 769."

The phrase "**punished summarily**" in subdivision (a) of this rule unquestionably has relation to the phrase "**Such summary vindication**" appearing on page 534 of the *Cooke* case, and, thus, to the clauses "the court must act **instantly**" and "**immediately** proceed to determine whether the facts justified punishment **and to inflict such punishment * * ***" contained in the same paragraph.

In this connection, the word summary has two connotations. One is: without formality. The other is: **immediately, without delay**. See any dictionary.

As we have shown, it is **only** the **need** for **immediate** action which empowers a Court to proceed without the formalities of notice and hearing in any matter of contempt. Where such a **need** does not exist, either because the contempt does not disrupt or tend to disrupt the orderly process of the court **or because of lapse of time**, the power to proceed without the formalities of notice and hearing **does not exist**.

To say this in a more graphic way: the power to punish summarily for contempt may be likened to a short whip the sole function of which is to enable the Court to repeal and subdue assaults upon its dignity and orderly procedure which are at once **both** immediate in point of time and at close range in point of space. When an assault is not at close range in point of space (that is where it is indirect) there is no **need**

for such a power, for the long whip of notice and hearing is fully capable and better suited to repel and subdue it. Similarly when an assault is not immediate in point of time there is no **need** for such a power, for, again and equally, the long whip of notice and hearing is fully capable and better suited to repel and subdue it. The "due process" clauses of the Constitution of the United States preclude the use of the short whip where the **need** for its use either has not come into existence or, having come into existence, has ceased to exist as the result of cessation of the attack and failure to use it while the attack was still in progress **or so recently in progress as to be deemed still in progress.**

This brings us to a consideration of certain thoughts expressed by Mr. Justice Holmes in his dissenting opinion in the case of

Toledo Newspaper Co. v. U. S., 247 U.S. 402.

We feel free to quote these thoughts of Mr. Justice Holmes as **judicial authority** for the reason that the majority opinion in that case was later overruled by the Supreme Court in the case of *Nye v. U. S.*, 313 U.S. 33 (on page 52) and because the Supreme Court in the latter case, cited the dissent of Mr. Justice Holmes as **reason in support of its decision** (on pages 51 and 52).

In his dissent in the *Toledo Newspaper Co.* case, Justice Holmes said, on page 423:

"* * * When it is considered how contrary it is to our practice and ways of thinking for the same person to be accuser and sole judge in a matter

which, if he be sensitive, may involve strong personal feeling, I should expect the power to be limited by the necessities of the case 'to insure order and decorum in their presence' as is stated in *Ex parte Robinson*, 19 Wall. 505. See *Prynne*, Plea for the Lords, 309, cited in *McIlwain*, *The High Court of Parliament and its Supremacy*, 191. And when the words of the statute are read it seems to me that the limit is too plain to be construed away. To my mind they point and point only to **the present protection of the Court from actual interference, and not to postponed retribution for lack of respect for its dignity**—not to moving to vindicate its independence after enduring the newspaper's attacks for nearly six months as the Court did in this case. Without invoking the rule of strict construction I think that 'so near as to obstruct' means so near as actually to obstruct—and not merely near enough to threaten a possible obstruction. 'So near as to' refers to an accomplished fact, and the word 'misbehavior' strengthens the construction I adopt. **Misbehavior means something more than adverse comment or disrespect."**

And on pages 425 and 426 Mr. Justice Holmes concluded:

"* * * I would go as far as any man in favor of the sharpest and most summary enforcement of order in Court and obedience to decrees, **but when there is no need for immediate action** contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts. **Action like the present in my opinion is wholly unwarranted by even color of law."**

The punishment imposed by Judge Harris on appellant in this case, being imposed at the time it was imposed, manifestly amounted to "postponed retribution for lack of respect for" the dignity of Judge Harris and/or the Court over which he was presiding and was not imposed for "the present protection of the court from actual interference."

Were there any room for doubt on this score it is completely removed by what Judge Harris said at the time of pronouncing sentence on appellant.

The following appears on pages 82 to 84 of the record:

"Tuesday, April 4, 1950

Verdict

* * *

The Clerk: April 10.

The Court: That is all with respect to the defendants. They may be seated.

Mr. Hallinan: Yes, your Honor.

The Court: Now I have several matters affecting counsel. *I might ask counsel to permit me without interruption to say what I have to say, and hereafter, at the conclusion, you may interpose whatever legal motion you may desire, or any individual request on your own behalf, or either of your behalves.* I suggest you remain seated, counsel, if you wish.

I approach these matters affecting the attorneys with considerable diffidence and no amount of reservation. For when I deal with the attorneys, I deal with officers of this court. I desire to address myself briefly to Mr. Hallinan *and Mr.*

MacInnis. And I say to you that from the beginning of this trial you have embarked upon a course of conduct designed and calculated to contemptuously provoke the Court in the hope that such provocation would lead the Court to commit error or plunge the case into a mistrial.

That such was your purpose has been entirely manifest to me. Such conduct is not alone an affront to the dignity of the Judiciary of the United States, it is an affront to the dignity, good name and honor of a great profession. I said to you, and I repeat, that members of the bar are officers of the court. My experience has demonstrated that a vast majority of lawyers, in and out of court, conduct themselves with propriety, integrity, dignity and honor.

Your assault on this Court cannot go unchallenged, and I am determined, so far as I am able, in my humble capacity, that such behavior as displayed by you shall not be repeated in other Federal courtrooms. America is justifiably proud of its judicial system, and anyone who attempts to degrade it or weaken it is working an injustice.

With regard to you, Mr. Hallinan, I retrace my steps momentarily to remind you that on the 22nd of November, 1949, the Court adjudged you guilty of criminal contempt, and thereafter regularly filed a certificate under the provisions of Rule 42(a) of the Rules of Criminal Procedure. Thereafter, upon the request of your client, Mr. Harry Bridges, I permitted you to remain as counsel in the case and granted a stay of execution until termination of the trial.

The consent of the Court was obtained upon the belief, reliance and understanding that there would not be a repetition of such conduct. Un-

fortunately, within a comparatively brief period you deliberately launched into a series of acts and conduct again resulting in criminal contempt, which I have more particularly found and specified in a certificate. During the course of the trial and since the first adjudication, you have, as a pattern of deliberate misconduct and in flagrant contempt of this Court, the dignity thereof and the respect due to it, sought to and did malign and abuse Government witnesses, attorneys and agents in a loud, contemptible manner. It is difficult to portray by written word your intonation, gestures and deportment, as well as the belligerent tone, mode and manner created. It is difficult to portray by the written word the loud language used by you and the contemptible language used by you, both in and out of the presence of the jury; all of which conduct was designed to bring into disrepute this Federal Court, as well as the judge thereof, charged with the administration of justice.

Accordingly, I specifically find that you, Vincent Hallinan, have been and you are now guilty of contemptuous conduct and misbehavior in the presence of the Court, in the particulars specified in the certificate which I have filed herein; thus obstructing the administration of justice. I therefore adjudge that you have been guilty of contempt of this Court for such conduct in the course of this judicial proceeding. It is adjudged that Mr. Vincent Hallinan is to serve six months in an institution to be designated by the United States Attorney General or his authorized representative, said sentence, however, to run concurrently with the previous judgment and sentence heretofore regularly made and entered on or about the 22nd day of November, 1949.

There then followed statements by Judge Harris and Vincent Hallinan with respect to the sentence of Vincent Hallinan following which Judge Harris, returning to the matter of appellant, said, on pages 87 and 88 of the Record:

With regard to James Martin MacInnis, this Court heretofore, and on the 28th day of February, 1950, regularly adjudged James Martin MacInnis guilty of contempt of this Court. The matter of judgment and sentence having been stayed and deferred until the completion and conclusion of the trial, and the trial having been concluded and terminated, now said James Martin MacInnis is sentenced to serve three months in an institution to be designated by the United States Attorney General or his authorized representative. *Although, in my opinion, Mr. MacInnis' contemptuous conduct was just as studied* and flagrant as that of Mr. Hallinan, nevertheless I feel he is entitled to a lesser sentence, for the reason that he appears to have been, to some extent at least, inspired by his senior colleague, Mr. Hallinan.*

From the foregoing it is manifest that the sentence on appellant was imposed not only as "postponed retribution for lack of respect for" the dignity of Judge Harris and/or the Court over which he was presiding but was imposed, in inseverable part, for acts of appellant "from the beginning of the trial,"—and inferentially to its end—concerning which no mention is made in the one and only certificate filed by Judge Harris and concerning which Judge Harris at

*The remarks of appellant set forth in the certificate could not have been studied for they were in immediate response to conduct of Judge Harris which no one could have anticipated.

no time adjudged appellant to be in contempt of court.

This fact alone—that is the fact that Judge Harris, in sentencing appellant, revealed that the punishment was imposed not only for the single act for which appellant had been adjudged in contempt of Court and which was recited in the certificate but also for other acts of appellant concerning which there had been no such adjudgment and which were unidentified in any way—necessitates a reversal of this case on the authority of *Cooke v. United States, supra*, as is evident from the following holding appearing on page 538, viz.:

“* * * On the other hand, *when the Court came to pronounce sentence*, it commented on the conduct of both the petitioner and his client in making scandalous charges in the pleadings against officials of the court and charges of a corrupt conspiracy against the trustee and referee in bankruptcy, and in employing a detective to shadow jurymen while in charge of the marshal, and afterwards to detect bribery of them, in proof of which the court referred to a sworn statement of the detective in its hands, which had not been submitted to the petitioner or his client. When Walker questioned this, the court directed the marshal to prevent further interruption. **It was quite clear that the court considered the facts thus announced as in aggravation of the contempt.** Yet no opportunity had been given to the contemnors even to hear these new charges of the court, much less to meet or explain them, before the sentence. **We think the procedure pursued was unfair and oppressive to the petitioner.**”

We next take up the matter of no statement in the Certificate of Judge Harris that the conduct of appellant disrupted, threatened to disrupt or even was intended to disrupt the orderly process of the Court. *The fact that Judge Harris delayed 28 days before adjudging appellant guilty of contempt and delayed 62 days before imposing punishment, reveals that Judge Harris, himself, did not regard the conduct of appellant to be of such character as to necessitate immediate imposition of punishment in order to preserve the orderly process of the Court, and, in the absence of a recitation in the Certificate that the conduct of appellant was such as to disrupt or to threaten to disrupt or to tend to disrupt the orderly process of the Court, no proper occasion for the exercise of power under Rule 42(a) Federal Rules of Criminal Procedure, appears.*

In this connection the following portion of the decision in *Cooke v. U. S.*, supra (at page 539) is particularly pertinent:

“Another feature of this case seems to call for remark. The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed *to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not*

bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that **where conditions do not make it impracticable**, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place."

From this it follows that the imposing of punishment on appellant, **having been so long delayed, it was not "impracticable"** for Judge Harris to have asked "one of his fellow judges" to pass upon the matter. Inasmuch as the conduct of appellant cited in the certificate of Judge Harris consisted in **its entirety** of a "personal criticism or attack upon" Judge Harris himself, it was his duty, under the foregoing pronouncement of the Supreme Court, as since given the force of statute in subdivision (b) of Rule 42, Federal Rules of Criminal Procedure, to proceed under that subdivision of the rule and, in so doing, **disqualify** himself "from presiding at the trial or hearing", and, by so doing, **"banish the slightest personal impulse to reprisal"** and **"avoid arbitrary or oppressive action."**

Instead of doing these things Judge Harris did the very things which the Supreme Court **condemned** in the *Cooke* case, with the result we submit, that the sentence imposed by Judge Harris on appellant is obviously "arbitrary and oppressive" and, as obviously, an act of "personal * * * reprisal" by Judge Harris.

CONCLUSION.

We respectfully submit that for the reasons, and for each and every one of the reasons, hereinbefore given, the judgment should be reversed.

Dated, San Francisco,
January 8, 1951.

Respectfully submitted,
WILLIAM F. CLEARY,
Attorney for Appellant.



In the United States Court of Appeals
for the Ninth Circuit

JAMES MARTIN MACINNIS, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

BRIEF FOR APPELLEE

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In the United States Court of Appeals for the Ninth Circuit

No. 12,599

JAMES MARTIN MACINNIS, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of California had jurisdiction over the appellant and power to punish him summarily for contempt committed in the presence of the Court under Section 401, Title 18, United States Code and Rule 42(a), Federal Rules of Criminal Procedure.

The statutory provisions and the rules involved are as follows:

Chapter 21 of Title 18, United States Code, provides:
§ 401. Power of Court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42, Federal Rules of Criminal Procedure, provides:

Rule 42. CRIMINAL CONTEMPT.

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the Court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission

to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

The judgment appealed from was entered on April 4, 1950 (R. 71-73), and the notice of appeal was filed on April 12, 1950 (R. 74-75). The jurisdiction of this Court rests on Section 1291 of the Judicial Code (U.S.C., Title 28, § 1291). See also Rule 37(a), Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

This is an appeal from an order entered on April 4, 1950 in the United States District Court for the Northern District of California, sentencing appellant to three months' imprisonment (R. 71-73, 87), upon his conviction by summary judgment on February 2, 1950 (Supp. R. 100-101) of misbehavior committed in the actual presence of the presiding judge on February 1, 1950, in violation of § 401, Title 18, U.S.C. (R. 33-34). Pursuant to Rule 42(a), Federal Rules of Criminal Procedure, an order and certificate reciting the facts constituting the misbehavior and certifying that the same was committed in the presence of the presiding judge during a session of the United States District Court for the Northern District of California, were signed by United States District Judge George B. Harris, issued on February 28, 1950 and entered of record in said Court on March 1, 1950 (R. 2-4). Notice of appeal from the order of April 4, 1950 was filed by appellant on April 12, 1950 (R. 74-75).

SUMMARY OF THE FACTS

Appellant MacInnis was counsel for defendants Schmidt and Robertson in the case of United States v. Harry R. Bridges, et al. (R. 74), the trial of which action began on November 14, 1949 before Judge George B. Harris in the United States District Court for the Northern District of California, and ended on April 4, 1950. Vincent Hallinan, Esquire, was counsel for the defendant Bridges in this case. The charges against the three defendants were, in substance, that the defendant Bridges had committed perjury in testifying in a naturalization case that he was not and had not been a member of the Communist Party, that the other two defendants had aided and abetted him in the commission of such perjury and that the three had conspired to have the defendant Bridges defraud the Government of the United States by committing such perjury (Br. 8-9).¹ On November 22, 1949, eight days after the trial of the *Bridges* case started, Vincent Hallinan, Esquire, was adjudged guilty of misbehavior in the presence of the Court, for which he was sentenced by Judge Harris to six months' imprisonment (R. 83, Br. 36). That judgment was affirmed by this Court in *Hallinan v. United States*, 182 F. 2d 880. Following this conviction, Mr. Hallinan committed further acts for which he was adjudged guilty of contempt at the end of the Bridges trial and sentenced to serve an additional six months' imprisonment, the second sentence being ordered to run concurrently with the first (R. 83-84).

On February 1, 1950, Father Paul Meinecke was called by the defense in the *Bridges* case to testify as a character witness in behalf of defendant Bridges and was interrogated on direct examination by appellant

¹ Opening Brief of Appellant

MacInnis (R. 4-5). The witness in substance testified, among other things, that he was a duly ordained priest in the Roman Catholic Church and had been such for the past twenty years (R. 5); that during the decade beginning about 1936-37 he was stationed at San Francisco, California (R. 5-6); that in this period he became interested in the labor movement and was instrumental in organizing in San Francisco the Association of Catholic Trade Unionists (R-7); that after ten years experience in the trade union movement in San Francisco he was transferred to a sparsely settled region of Nevada where there were no labor unions (R. 6, 26); and, that this transfer was made at his request (R. 27).

After completion of the direct and cross examination by counsel for the defense and the prosecution, the Court interrogated the witness, in the course of which Father Meinecke in substance testified, among other things, that he was appearing in court pursuant to subpoena; that he arrived in San Francisco the previous evening at which time he met appellant MacInnis and had dinner at MacInnis' home (R. 31); that during the evening he discussed the *Bridges* case with appellant; that he rarely sees a newspaper and that he asked appellant to refresh his recollection as to the date on which he first met Bridges (R. 32); that while stationed in San Francisco he was well oriented with respect to time, but that since being stationed in Nevada the " * * * years have sort of run together. I say a couple of years ago, and then I remember back, it was 15 years ago." (R. 33). The trial judge then inquired: "Have you been recently subjected to medical treatment, Father?" (R. 33), after which the following colloquy occurred (R. 33-34):

Mr. Hallinan: If the Court please, I am going to object to these questions.

Mr. MacInnis: Let me in.

Mr. Hallinan: I want to enter a legal objection. Your Honor has seen the Manning Johnsons, the Crouches, the Rosses and everybody get on that stand and we asked whether they were insane or not. I object to your Honor's question. I object to that last question and assign that as misconduct, and I ask that the jury be instructed to ignore the implication of the question.

The Court: There is no occasion for any admonition to the jury. Mr. MacInnis invited it.

Mr. MacInnis: I never heard of such a question.

The Court: Mr. MacInnis invited me to ask the question.

Mr. MacInnis: Your Honor refused to do that and I asked a question.

The Court: I have the greatest respect for men of the cloth, as we all have.

Mr. MacInnis: You are demonstrating it.

The Court: There is no impropriety in my questioning.

Mr. MacInnis: I say there is.

The Court: He asserted his present memory is not good. I asked him whether or not his recollection was good while he was here years ago. He said yes, it was good years ago. I don't see any reason for the criticism.

Mr. MacInnis: When one of the prosecution witnesses was on the stand we asked him if he had received medical treatment, and now you ask a priest who comes here and gives testimony the same question.

The Court: Ladies and gentlemen—

Mr. MacInnis: I think you should cite yourself for misconduct.

The Court: Ladies and gentlemen—

Mr. MacInnis: I never heard anything like that. You ought to be ashamed of yourself.

At the prosecution's request, acquiesced in by appellant MacInnis, the witness remained over until the following day, February 2, 1950, on which date his testimony was completed (R. 36-70). After the conclusion of Father Meinecke's testimony on February 2, 1950, Judge Harris in the course of the following colloquy orally adjudged appellant MacInnis guilty of contempt of Court for his described conduct of the preceding day, committed in the presence of the trial judge, and informed appellant MacInnis that he would thereafter file a certificate and an order pursuant to Rule 42 of the Federal Rules of Criminal Procedure but would defer sentence until a later date in the trial (Supp. R. 100-101):

And I might say, Mr. MacInnis, that in reading the transcript, I concluded that the proper administration of justice and maintenance of respect due the courts require me to certify that yesterday you committed conduct in the actual presence of this Court constituting contempt.

Mr. MacInnis: Before your Honor finds—

Mr. Hallinan: Might I represent Mr. MacInnis in this before you say anything further?

The Court: And I say for the record, that the Court, in [4977] the proper exercise of its function, propounded a relative and pertinent question to the witness, Father Paul Meinecke, whereupon Mr. MacInnis addressed the Court as follows:

“I think you should cite yourself for misconduct. I have never heard anything like that. You ought to be ashamed of yourself.”

That appears at transcript page 4796. I say to you, Mr. MacInnis—

Mr. Hallinan: Your Honor, might I be heard on that before—

The Court: I say to you, Mr. MacInnis, that this Court will file a certificate and an order pursuant to Rule 42 of the Rules of Criminal Procedure.

Mr. Hallinan: Your Honor, may I be heard?

The Court: One moment, Mr. Hallinan.

Mr. Hallinan: I have never heard such a — Why can't I be heard in the matter?

The Court: And making such order and fixing such punishment will be deferred. I will defer the punishment to later, to a later date in the trial.

Mr. Hallinan: Very well.

The Court: We will now stand adjourned until tomorrow morning at 10:00 o'clock.

Subsequently, while the Bridges trial was still in progress, Judge Harris on February 28, 1950 issued an order on contempt as to appellant MacInnis, filed March 1, 1950, the text of which order reads as follows (R. 2):

ORDER ON CONTEMPT

On the first day of February, 1950, the defendant appeared in person.

It is adjudged that the defendant is guilty of contempt of court for misconduct during the judicial proceeding in United States v. Harry Renton Bridges, Henry Schmidt and J. R. Robertson, No. 32117-H, as specified in the accompanying certificate.

It is ordered that the defendant appear before this Court for sentence upon the termination and

conclusion of the trial stages in United States v. Harry Renton Bridges, Henry Schmidt, and J. R. Robertson, No. 32117-H.

It is further ordered that the Clerk deliver a certified copy of this Order on Contempt and the accompanying certificate to the United States Marshal or other qualified officer.

Certified this 28th day of February, 1950, at San Francisco, California.

/s/ GEORGE B. HARRIS

United States District Judge

Also on February 28, 1950, Judge Harris issued a certificate on contempt in conformity with Rule 42(a) of the Federal Rules of Criminal Procedure, entered of record March 1, 1950, reading as follows (R. 3-4):

CERTIFICATE IN CONFORMITY WITH RULE 42(a)
FEDERAL RULES OF CRIMINAL PROCEDURE

In conformity with Rule 42(a), Federal Rules of Criminal Procedure, I hereby certify that the conduct for which the defendant is punished for criminal contempt was committed in my presence and was seen and heard by me during a session of the United States District Court for the Northern District of California, Southern Division, under the following circumstances:

On the morning of Wednesday, February 1, 1950, following the examination by counsel for defendant and counsel for the Government, of the witness, Father Paul Meinecke, the Court had occasion to interrogate the witness. After propounding several questions, the Court asked a proper and pertinent question, directed toward the physical well-being of the witness, to wit:

Q. Have you been recently subjected to medical treatment, Father?

(Tr. p. 4794, lines 20-21.)

Following such question, Mr. MacInnis jumped to his feet, participated in a critical remonstrance of the Court, at the conclusion of which he stated to the Court in a belligerent manner in the presence of the jury, to wit:

Mr. MacInnis: I think you should cite yourself for misconduct.

The Court: Ladies and gentlemen—

Mr. MacInnis: I have never heard anything like that. You ought to be ashamed of yourself.

(Tr. p. 4796, lines 2-6.)

The entire record of the testimony of Father Paul Meinecke, designated Exhibit A, is attached hereto, and is made a part of this Certificate.

Certified this 28th day of February, 1950, at San Francisco, California.

/s/ GEORGE B. HARRIS

United States District Judge

As indicated in the text, there was attached to and made a part of the foregoing certificate a complete transcript of the testimony of Father Paul Meinecke and the proceedings which occurred during his testimony (R. 4-70).

Immediately following the return of the verdict in the *Bridges* case on April 4, 1950, the Court issued its judgment that appellant be sentenced to three months' imprisonment (R. 71-73, 87,) from which order the present appeal is being prosecuted (R. 74-75; Br. 5).

SUMMARY OF THE ARGUMENT

I. Appellant, as an attorney, was an officer of the Court, and owed an unusually high duty to assist in maintaining the Court's authority and dignity. The abusive language used by appellant in addressing the presiding judge in the presence of the jury during the trial of the *Bridges* case, considered in conjunction with his belligerent demeanor, implied an unmistakable purpose to flout the authority and dignity of the Court and amply supported the Court's adjudication of contempt.

II. It is strenuously contended that the presiding judge's conduct and rulings were proper, but even if erroneous, appellant had the adequate remedy of appeal and was not thereby licensed belligerently to assail the authority and dignity of the Court and bring it into public disrepute.

III. Jurisdiction to punish summarily for contempt committed in the Court's presence, without notice or hearing, attaches at the time the offense is committed, and such jurisdiction is not lost by the Court's postponing to a more propitious time the exercise of its summary power, especially if the period of postponement is not unreasonable and does not operate to the substantial prejudice of the contemnor. The Court should exercise its summary power with circumspection, having due regard contemporaneously to the vindication of the dignity and authority of the Court, its protection from further contempt, and the preservation of all parties and officers before the Court from unnecessary prejudice or injury. Under the circumstances of the instant case it was proper for the Court on the day following appellant's misbehavior to adjudge him in contempt, and to postpone the filing of the formal order and certificate and the imposition of sentence until a later date in the trial.

IV. In fixing sentence for contempt committed by an attorney in the presence of the Court during the trial of a case, the presiding judge may properly take into consideration the contemnor's general conduct in the case as bearing upon the intent with which the offense was committed and as mitigating or aggravating the penalty. The sentence assessed by the presiding judge, who is in best position to determine a proper punishment, will not be disturbed on appeal in the absence of a gross and palpable abuse of discretion.

ARGUMENT

I.

Appellant's Conduct Was Misbehavior Within the Meaning of § 401 of Title 18, U.S.C.

Pursuant to the provisions of 18 U.S.C. § 401 and in conformity with Rule 42(a), Federal Rules of Criminal Procedure, United States District Judge George B. Harris certified that in the presence of the Court appellant MacInnis, defense counsel in a criminal case then on trial, jumped to his feet and participated in a critical remonstrance of the Court over a proper question which the Court had directed to a defense witness, and that appellant concluded his remonstrance by stating to the Court in a belligerent manner and in the presence of the jury (R. 3-4):

Mr. MacInnis: I think you should cite yourself for misconduct.

The Court: Ladies and gentlemen—

Mr. MacInnis: I have never heard anything like that. You ought to be ashamed of yourself.

In appraising appellant's behavior as described in the Court's certificate, consideration should be given not only to the language used by appellant but also to Judge Harris' description of appellant's contemptuous

demeanor, i.e., that he “jumped to his feet, participated in a critical remonstrance of the Court” and that he addressed himself to the Court “in a belligerent manner in the presence of the jury.” Appellant does not dispute this finding. The written record can not adequately describe the atmosphere prevailing in the courtroom during the turbulent proceedings involved, and the judge’s characterization of appellant’s bearing is entitled to great weight upon a review of the propriety of the trial court’s adjudication of contempt. *Fisher v. Pace*, 336 U.S. 155, 161; *Ex parte Robinson*, 86 U.S. 505, 511; *Hallinan v. United States*, 182 F. 2d 880, 887, 888 (C.A. 9); *United States v. Green*, 176 F. 2d 169, 172 (C.A. 2).

Inexcusable in a layman, the behavior in question on the part of an attorney engaged in the trial of a case was gross contumely. As an officer of the court, an attorney is under a higher duty than the ordinary citizen to uphold the dignity of the court and to conduct himself with propriety while engaged in his professional activities at the bar. *Hallinan v. United States*, 182 F. 2d 880, 888 (C.A. 9); *In re Maury*, 205 F. 626, 629 (C.A. 9); *United States v. Ford*, 9 F. 2d 990, 992 (D.C. Mont.); *United States v. Anonymous*, 21 F. 761, 771, (D.C. Tenn.).

The insolent language used by appellant MacInnis in addressing the presiding judge, coupled with appellant’s belligerent manner, unquestionably implied a purpose to flout the authority and dignity of the Court and to intimidate it in its administration of the law. Appellant admits that in his behavior, “every *appearance* of contempt is present.” (Br. 10). Appellate courts consistently have held such conduct to be contemptuous and have affirmed the right of the trial judge summarily to punish such contempts. *Fisher v. Pace*, 336 U.S. 155; *Ex parte Terry*, 128 U.S. 289; *Hal-*

linan v. United States, supra; In re Maury, supra; United States v. Sacher, 182 F. 2d 416 (C.A. 2); *United States v. Hall*, 176 F. 2d 163 (C.A. 2); *United States v. Green*, 176 F. 2d 169 (C.A. 2); *United States v. Bollenbach*, 125 F. 2d 458 (C.A. 2); *United States v. Landes*, 97 F. 2d 378 (C.A. 2). In fact, the Court observed in the *Bollenbach case, supra*, at page 460, “* * * the judge would have been unfit for his office if he had not made use of those sanctions which the statute gave him.”

II.

There Was No Excusable Justification for Appellant's Misbehavior.

After admitting that in his reported behavior, “every *appearance* of contempt of Court is present,” appellant proceeds to devote the bulk of his brief to a reiteration and amplification of his original contemptuous remarks, claiming legal excuse for the contempt on the ground that as defense counsel it was his duty, in the face of the presiding judge's alleged prejudicial treatment of his clients, to reprove the Court in forceful and unmistakable language and, in the jury's presence, to charge that the Court should have been ashamed of itself and should have cited itself for misconduct (Br. 10-55).

By a tortuous process of specious reasoning, including strained interpretations of events occurring after the commission of the contempt, hypercritical definitions of the meanings of some of the words and phrases used by the trial judge, inferences based upon inferences, and claimed innuendo hidden in the Court's innocent language, appellant purports to construct a factual basis for his charge that the presiding judge was prejudiced against the defendants in the *Bridges* case and sought to secure their convictions (Br. 10-55). Appellant asserts that in asking the witness Meinecke if

he had been recently subjected to medical treatment, the presiding judge was in fact trying to assist the prosecution and jeopardize the defense of the case by making it appear to the jury that this witness to the good reputation of Bridges had been mentally ill and was unreliable (Br. 10-38). Appellant claims that partially because of this alleged ulterior motive of the Court, and also because the question was improper under previous rulings of the trial judge, appellant was justified in rebuking the Court in the manner described (Br. 38-43). However, appellant goes on to state that the principal reason for his behavior was his duty as an attorney to protect his client from the consequences of the Court's alleged false statement in the jury's presence that the appellant invited the Court to ask the question relating to the witness' health (Br. 43-55).

It is not necessary on this appeal to defend the presiding judge's conduct in the Bridges trial against the attacks of appellant MacInnis. While it is strenuously asserted that Judge Harris' conduct toward the defendants on trial and toward their counsel was eminently tolerant, fair and impartial, that conduct is a matter for review by this Court upon an appeal on the merits in the *Bridges* case. The propriety of appellant's behavior, not that of the Court, is now the issue.

It may be pointed out, however, that if Judge Harris had desired to destroy the effect of Father Meinicke's testimony, which appears to have been incompetent, it was not necessary for him to resort to the abstruse process of innuendo and veiled suggestion attributed to him by appellant. He could have done so quickly, directly and more certainly by granting the Government's motion to strike the witness' testimony from the record and instructing the jury to disregard it. Instead, however, demonstrating a liberal attitude toward the reception of evidence offered in behalf of

defendants, Judge Harris overruled the motion and allowed the testimony to stand (Supp. Tr. 97-100).

It is of course conceded that appellant had the duty, in an orderly manner, to employ before the Court every legitimate argument and tactic at his command which he thought might serve his clients' interests. But it was not in his clients' interests and it was not legitimate for him belligerently to remonstrate with the Court over its actions and publicly to accuse it of official malfeasance.

In his capacity as advocate for the defendants Robertson and Schmidt, appellant MacInnis did not appear before Judge Harris on the trial of the *Bridges* case as a matter of right—he was in court as a matter of license, conditioned upon his compliance with the requirements of the Bench and Bar. He should have been aware that fidelity to the Court, of which he is an officer, was his paramount obligation and that no duty to his clients could have justified his flagrant contempt of the authority and dignity of the Court. *United States v. Ford*, 9 F. 2d 990, 992, (D.C. Mont.); Cooley, *Constitutional Limitations*, Eighth Edition, at page 708.

In *Hallinan v. United States*, 182 F. 2d 880 (C.A. 9), this Court affirmed the contempt judgment against appellant's associate counsel in the *Bridges* case, and stated at pages 886 and 888:

Appellant argues that the opening statement he was making could not have been curtailed without endangering the defense. We see no force to this argument. The ruling of the Court should have been complied with. The record was sufficiently definite to have permitted a review by an appellate court of the question of whether the opening statement had been unduly limited. *Sunderland*

v. *United States*, 8 Cir., 1927, 19 F. 2d 202, 208, 210-211.

* * * * *

An officer of a court has a higher duty to assist in maintaining the dignity and integrity of courts than does the ordinary citizen. True, every lawyer, if he is worthy of the name, must use every legitimate effort in support of his client and in so doing will be relieved from an improper contempt judgment. *Caldwell v. United States*, 9 Cir., 1928, 28 F. 2d 684. No such condition exists here. The record reflects quite the contrary. From cases cited in the briefs we learn that appellant has on two occasions been held in contempt of a State court.

In *United States v. Sacher*, 182 F. 2d 416, 430 (C.A. 2), the attorneys for various defendants on trial for conspiring to advocate the overthrow of the Government by force and violence were summarily punished for contempt when the trial was finished. In affirming the action of the presiding judge, the Appellate Court said:

The chief defense which appellants make for their obstructive acts and impudent charges is that the judge provoked them by making what they consider indefensible rulings in the case. The validity of these rulings is not before us on this appeal. But it must borne in mind that when counsel differ as to the rulings of a judge, they acquire no privilege to charge him with bad faith and misconduct, and to obstruct the trial. Their only remedy is by an appeal.

United States v. Landes, 97 F. 2d 378, 380 (C.C.A. 2), is further authority for the proposition that counsel should assist in maintaining the dignity of the Court

and "should never try to injure its authority or attempt defiance thereof."

Likewise, appellant's contention that the Court's question to the witness Meinecke was legally improper under prior rulings of the presiding judge can not excuse his misbehavior. Objection to the question was made which sufficiently preserved the Court's action for review (R. 33). Appellant's dissatisfaction with this adequate legal remedy can not justify his subsequent venomous tirade against the Court.

In *Fisher v. Pace*, 336 U.S. 155, the Supreme Court of the United States, at page 162, quoted with approval the following excerpt from the opinion of the Supreme Court of Texas in *Ex parte Fisher*, 146 Tex. 328, 335, 206 S.W. 2d 1000, 1005:

It was the duty and power of the trial judge in the trial of the compensation suit to determine the type, manner and character of the argument before the jury. Of course his rulings thereon were subject to review in the appellate courts, but he has the power to make them whether right or wrong. If they are erroneous the injured party has the plain, simple and adequate remedy of appeal. It was thus the duty of counsel to abide by his decisions even if erroneous; and if any rights of his clients were violated the remedy was by exception and appeal. Any other procedure would result in mockery of our trial courts and would destroy every concept of orderly process in the administration of justice.

In *Hallinan v. United States*, *supra*, this Court said at pages 885 and 887:

If it be true, as appellant maintains, that the matters which he proposed to prove were entirely

proper as a defense, his remedy was on appeal, not to wilfully disregard the rulings of the Court. *United States v. Bollenbach*, 2 Cir., 1942, 125 F. 2d 458.

* * * * *

All practitioners know that in the trial of cases courts and lawyers often disagree as to the admissibility of evidence. It is further generally recognized that the trial court has the duty of determining the question of admissibility for the time being at least and that when the Court has spoken, upon counsel is then imposed the duty of abiding by that ruling. The error, if any, is to be corrected elsewhere.

This general rule is too well established to merit further discussion. It seems obvious from the authorities cited that the presiding judge's conduct and rulings in the case on trial, erroneous or not, can not excuse this appellant's belligerent flouting of the authority and dignity of the Court.

III.

The Court Had, and Properly Used, Summary Power to Adjudge Appellant Guilty of Misbehavior in Its Presence and to Punish Him for the Offense.

Appellant contends that under the "due process" clauses of the Constitution and Rule 42, Federal Rules of Criminal Procedure, the power of the presiding judge to impose summary punishment for misbehavior committed in his presence is limited to contempts which actually obstruct, or tend to obstruct, the orderly process of the Court and which require immediate disposition to prevent the demoralization of the Court's authority before the public. Appellant argues that since there was no need for summary disposition of the

subject conduct, as indicated by the Court's failure to take immediate action and by its failure to certify that the conduct had any obstructive qualities or tendencies, the Court either never acquired jurisdiction to punish him summarily, or else lost such jurisdiction before sentence was imposed (Br. 56-71).

In support of his contentions appellant relies upon dicta of the Supreme Court in *In re Oliver*, 333 U.S. 257, 275; *Cooke v. United States*, 267 U.S. 517, 534-35; and Justice Holmes' dissenting opinion in *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 423 (Br. 56-71). These cases, which were considered and distinguished in *United States v. Sacher*, *infra*, did not involve contempts committed in the presence of the presiding judge or questions of procedure analogous to those in the subject appeal. Essentially, appellant's arguments amount to nothing more than a protest over the provisions of existing law which invest the Federal court with power summarily, and without notice or hearing, to punish for misbehavior committed in its presence.

Inherent in the capacity of Courts to function at all is their power to enforce decorum in judicial proceedings, to compel submission to their orders, and summarily to punish the defiant and contumelious for misbehavior in the Court's presence. It is well established that the exercise of such summary powers by the Court accords due process of law to the contemnor. The Supreme Court recently had occasion to reaffirm this universally conceded doctrine in *Fisher v. Pace*, 336 U.S. 155, 159-160.

Section 401 of Title 18. U.S.C., provides that the Court shall have power to punish such contempt of its authority, and none other, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

It is apparent that Subdivision 1 of this section authorizes the Court to punish two types of contempt, (a) misbehavior of any person occurring within its sight or hearing and as to which it has direct personal knowledge, or (b) misbehavior of any person outside its immediate presence and as to which it does not have personal knowledge, but which is sufficiently near the Court as to obstruct the administration of justice. (See *Savin, Petitioner*, 131 U.S. 267 at 277).

Reasserting the long conceded power of federal courts to proceed summarily against contempts in their presence, Rule 42(a), Federal Rules of Criminal Procedure, provides:

- (a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the Court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Criminal Rule 42(b) provides for the disposition upon notice and hearing of criminal contempts not occurring in the Court's presence.

It seems beyond question that appellant's challenged conduct was misbehavior in the presence of the Court within the meaning of 18 U.S.C., § 401(1) and that,

under Rule 42(a), Federal Rules of Criminal Procedure, the Court had jurisdiction to punish appellant summarily without notice or hearing. In view of the fact that appellant's offense falls within the first category of 18 U.S.C. § 401(1), described above, and that he was convicted of such offense (Supp. R. 100-101), it was necessary in the order of contempt under Rule 42(a) for the judge only to recite the facts constituting the misbehavior and certify that it was committed within his actual presence. This was done. A further certification under the second category of the offense defined in § 401(1), that the contempt obstructed the orderly process of the Court, was unnecessary, although it is apparent that the appellant's conduct not only did obstruct the administration of justice, but also violated § 401(2) proscribing "misbehavior of any of its officers in their official transactions."

Although the Court adjudged appellant in contempt on the day following his acts of misbehavior, appellant MacInnis completely ignores this fact and argues that Judge Harris lost jurisdiction to dispose summarily of the misconduct because he waited until twenty-eight days later in the Bridges trial before performing the ministerial act of filing the formal order and certificate required by Criminal Rule 42(a) and waited until the end of the trial, sixty-two days later, before imposing punishment (Br. 57-69). Having been adjudged in contempt, no right of appellant was prejudiced by the fact that the Court awaited a propitious time to complete the disposition of the offense. At the time he was found guilty, appellant was told by Judge Harris that the filing of the formal order and certificate and the imposition of sentence would be deferred (Supp. R. 100-101). This procedure was thoroughly reasonable and proper.

In *Ex parte Terry*, 128 U.S. 289, summary punish-

ment for contempt in the presence of the Court was imposed on the same day, but some time after the offense was committed. In rejecting the petitioner's contention that the trial court lost jurisdiction to punish him summarily by delaying the exercise of its powers, the Supreme Court said at page 311:

In our judgment this question must be answered in the negative. Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the circuit court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred, to immediate punishment.

The Supreme Court in the *Terry* case left open as not necessary to its decision the question of whether or not the presiding judge would have retained jurisdiction to punish summarily for the contempt on a later day in the same term, or in a subsequent term. However, this Court, in *In re Maury*, 205 F. 626 (C.A. 9), construed the *Terry* case as authorizing a trial Court summarily to adjudge an offender guilty of a contempt in its presence on the day after its commission. It said at page 632:

We are of opinion that the rule laid down in the case of *Terry* is entirely applicable to the case before this Court. Obviously there can be no distinction between delaying until later in the same day, and delaying until the next day, before making an order adjudging an offender guilty of contempt of court; jurisdiction of the person of the offender having attached instantly upon the contempt being committed in the presence of the court.

This Court again ruled on this question in *Hallinan v. United States*, 182 F. 2d 880, 887 (C.A. 9), where it succinctly stated, in affirming the conviction of appellant's associate counsel for contempt in the presence of Judge Harris:

It is said that the Court lost jurisdiction to proceed under Rule 42(a) by waiting from the adjournment of court on the evening of November 21, 1949 until 9:30 a.m. of November 22, 1949, before pronouncing the judgment of contempt. We do not agree. *In re Maury*, 9 Cir., 1913, 205 F. 626; *United States v. Sacher*, 2 Cir., 1950, 182 F. 2d 416.

Then, after quoting Rule 42(a), the Court continued:

We think the word "summarily" does not require hasty determination and that the night hours spent by the judge in preparing his summation for his contempt order, delivered on the following morning, are not an improper incident to summary action.

In appraising the propriety of the trial judge's procedure in the subject case, consideration should be given to the difficult environment in which the contempt was committed. Attention is directed to Judge Harris' observation that from the beginning of the Bridges trial appellant MacInnis and his associate, Vincent Hallinan, Esquire, "embarked upon a course of conduct designed and calculated to contemptuously provoke the Court in the hope that such provocation would lead the Court to commit error or plunge the case into a mistrial." (R. 82.) Eight days after the trial started, attorney Hallinan was summarily sentenced to imprisonment for contempt of Court, but at the request of defendant Harry Bridges, execution of

the sentence was stayed until the termination of the trial and Mr. Hallinan was permitted to continue as counsel in the case (R. 83). Within a comparatively brief period thereafter, Mr. Hallinan committed additional acts of misbehavior for which he was again sentenced at the end of the Bridges trial (R. 83-84).

It was in this setting that appellant MacInnis committed the acts of misconduct now under consideration. In the circumstances, Judge Harris was obviously anxious to avoid hasty action which might endanger the defense of the Bridges case or interfere with its conduct. By permitting himself the evening to consider the matter of appellant's contempt, in detachment from the tension of the courtroom, Judge Harris had an opportunity to decide upon the best course of action to vindicate the authority and dignity of the Court and yet avoid unnecessarily arbitrary or oppressive conclusions upon the parties to the case on trial. Judge Harris accomplished this result by summarily adjudging appellant MacInnis guilty of contempt the following day, and suspending the imposition of sentence until the termination of the Bridges trial.

It was obviously to the advantage of appellant and his clients that sentence be not imposed upon him immediately after he launched his belligerent attack upon the Court. Punishment imposed in the direct wake of this tirade might have been much more severe than that actually imposed after the Court had given itself a "cooling off" period; punishment imposed immediately might have created an impression on the jury unfavorable to appellant and his clients; and punishment imposed during trial would probably have required appellant to interrupt his efforts in behalf of his clients in order to prosecute his own appeal.

The rights of appellant and the summary jurisdiction of the Court were in no way affected by the fact

that, after orally adjudging appellant guilty of misbehavior in his presence, Judge Harris awaited a more convenient time in the trial to file the formal order and certificate on contempt. Appellant does not show that he was prejudiced by this postponement. At the time of the oral judgment, appellant was told those documents would be filed later (Supp. R. 100-101).

A similar question arose in *United States v. Hall*, 176 F. 2d 163, 168 (C.A. 2), where formal orders and certificates on contempt were filed eight days after summary punishment was imposed. In approving this action of the presiding judge, the Appellate Court said:

He could probably have formally adjudged the appellants in contempt sooner than he did and filed the formal orders and certificates sooner, but that is quite beside the point because the few days delay did not legally prejudice them. Before their appeals were taken the original oral remands had been superseded by the formal orders and the filing of the certificates, all of which, and not the original orders alone, now form the basis for their sentences.

Likewise, the legitimate rights of appellant and the summary jurisdiction of the Court were not affected by the fact that sentence was not imposed upon him until after the conclusion of the Bridges trial. The record does not indicate that appellant sought an earlier sentence. He shows no prejudice from this postponement.

In *United States v. Sacher*, 182 F. 2d 416 (C.A. 2), the attorneys for some of the defendants in a criminal case were summarily punished for misbehavior committed in the Court's presence during the course of a ten months' trial. The adjudications of contempt, the

filing of orders and certificates, and the imposition of sentences all followed upon the return of verdict in the main case, in some instances months or weeks after the acts of misbehavior occurred. In rejecting the attorneys' contention that the presiding judge had no jurisdiction at the end of the trial to punish them summarily for contempts committed during its progress, the Court said at page 429:

The conclusion we have reached in overruling the appellant's second objection is borne out by a decision of the Ninth Circuit [*In re Maury*, 205 F. 626] and by several decisions in the state courts where summary punishment for contempt was imposed under statutes similar to the one governing the case at bar. They are all to the general effect that the punishment should follow the acts of contempt with reasonable promptitude, but that the degree of promptitude depends upon the particular facts of each case, and that the punishment need not follow immediately if such an imposition would endanger the defense in a criminal case, or interfere with its conduct. [citing *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650; *In re Cary*, 165 Minn. 203, 206 N. W. 402; *In re Willis*, 94 Wash. 180, 162 P. 38].

Other cases in harmony with the Government's position on this point are *O'Malley v. United States*, 128 F. 2d 676, 684 (C.A. 8), reversed on another ground, sub nom. *Pendergast v. United States*, 317 U.S. 412; *In re Presentment by Grand Jury of Ellison*, 44 F. Supp. 375 (D.C. Del.); *In re Grossman*, 109 Cal. App. 625, 631-632, 293 Pac. 683, 685-686; *Albano v. Commonwealth*, 315 Mass. 531, 532-535, 53 N.E. 2d 690, 691-692; and *In re Cary*, 165 Minn. 203, 206 N.W. 402.

It is submitted that, under the circumstances of this case, the Court properly exercised its summary powers to punish appellant for his gross misbehavior.

IV.

The Sentence Was Properly Imposed and Was Not Excessive.

Appellant contends that in fixing sentence the Court was improperly influenced by unspecified acts of alleged misconduct committed by him during the trial, but for which he was not adjudged in contempt, and that the sentence was therefore excessive (Br. 64-67).

Appellant apparently bases his contention on the observation by Judge Harris, just prior to the imposition of sentence, that it was manifest that from the beginning of the trial defense counsel had "embarked upon a course of conduct designed and calculated to contemptuously provoke the Court in the hope that such provocation would lead the Court to commit error or plunge the case into a mistrial." (R. 82.) What that conduct was, whether it consisted of acts, or the failure to act, of gestures, words, inflections of the voice, or what, is not specified. But, whatever it was, the conduct occurred in Judge Harris' presence, was observed by him, gave emphasis to the intent with which appellant committed his contempt, and was properly taken into consideration by the Court in fixing sentence. *Sullivan v. Ashe*, 302 U.S. 51; *State v. Noble*, 55 F. 2d 227 (C.A. 4); *Bailey v. United States*, 284 F. 126, 127 (C.A. 7); *Peterson v. United States*, 246 F. 118 (C.A. 4).

The case of *Cooke v. United States*, 267 U.S. 517, relied upon by appellant as supporting his contention, is not in point because there the contemnor was summarily punished for an offense not committed in the presence of the Court and which should have been prosecuted upon notice and hearing. In assessing punishment the presiding judge improperly gave considera-

tion to other specific acts which did not occur in the Court's presence, which Cooke was not permitted to deny or explain, and of which the Court had no legitimate knowledge.

The contempt statute, 18 U.S.C. § 401, does not limit the amount of "fine or imprisonment" which may be assessed against a contemnor, but leaves the extent of the punishment to the sound discretion of the Court. Appellate courts consistently have held that the trial judge is in best position to fix a proper penalty for contempt in his presence, and that the sentence imposed by him will not be reviewed or disturbed in the absence of a showing of gross and palpable abuse of discretion. *Ex parte Terry*, 128 U.S. 289, 309-310; *Hallinan v. United States*, 182 F. 2d 880, 887-888 (C.A. 9); *In re Maury*, 205 F. 626, 632 (C.A. 9).

In any event, however, appellant has no ground for complaint here since it does not appear that the Court's consideration of counsel's general demeanor during the trial aggravated the appellant's punishment. After pronouncing sentence, the Court stated to appellant (R. 87):

Although, in my opinion, Mr. MacInnis' contemptuous conduct was just as studied and flagrant as that of Mr. Hallinan, nevertheless I feel he is entitled to a lesser sentence, for the reason that he appears to have been, to some extent at least, inspired by his senior colleague, Mr. Hallinan.

We believe the following language in *Sachs v. Government of the Canal Zone*, 176 F. 2d 293, 300 (C.A. 5), cert. den. 338 U.S. 858, used in affirming a sentence for criminal libel, is singularly applicable to appellant's entire brief in the subject case.

In his attack upon the sentence, as distinguished from the conviction, the brief carries forward the same bitterness of attack, the same venom and anger, against the District Attorney. It does not put forward, as mitigating the offense, that appellant was acting in the heat of anger. He made no effort below, he makes none here, to apologize for his libelous charges or to explain them away on this ground. He made the attack in bitterness and resentment. He has continued it the same way. Complaining here of the sentence as unduly severe and asking its correction, he does not do so as an erring person convinced of his error and bringing forth fruits meet for repentance, but in anger and resentment. His brief states that he is a college graduate, a naval veteran, and that he has no previous record of crime. These facts show that he is not an underprivileged, illiterate and misled person, offending through ignorance, but a thoroughly informed one, who has knowingly offended and repents not. They make against him rather than for him when, with a vigorous determination to fight the matter out to the end in self-righteousness and as an accuser, he demands a reduction of his sentence instead of confessing his guilt and suing in repentance for a mitigation of its punishment.

CONCLUSION

We respectfully submit that the judgment of the District Court should be affirmed.

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Dated: February 26, 1951

No. 12,599

IN THE

United States Court of Appeals
For the Ninth Circuit

JAMES MARTIN MACINNIS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court, Northern
District of California, Southern Division.

REPLY BRIEF FOR APPELLANT.

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PAUL F. O'BRIEN,
CLERK

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District of California, Southern Division.

REPLY BRIEF FOR APPELLANT.

The most noteworthy fact about the brief for Appellee is that, except for unsubstantiated general denials and castigating denunciations, *nowhere* therein is *any* attempt made to refute, or to answer, or to explain away, or to lessen the logical impact of, *any* of the factual statements, or *any* of the factual analyses, or *any* of the factual deductions contained in the opening brief for Appellant under Appellant's First Point, pages 10 to 55 inclusive.

This is so notwithstanding the fact that three times in that argument Appellee was explicitly challenged to suggest explanations, other than the ones made by Appellant, which were in the least bit plausible (OBFA 10-20, 22 and 48) and notwithstanding the

further and more important fact that the whole of the argument under Appellant's First Point is of such a character as not only to *challenge* refutation but to *defy* refutation.

The fact that no attempt has been made by Appellee to refute such argument, or even to find flaws in it, indicates, and we think quite conclusively, that, despite its unsubstantiated general denials and castigating denunciations, Appellee has found that argument to be unassailably correct, not only as a whole but in each of its parts.

While not attempting to refute or answer that argument, Appellee has taken, or pretended to take, certain positions with respect to it. We now proceed to examine such positions, to the extent that the page limitation of Rule 20, Section 2, subdivision (f) will permit.

On page 15 of its brief Appellee says:

It is not necessary on this appeal to defend the presiding judge's conduct in the Bridges trial against the attacks of appellant MacInnis. While it is strenuously asserted that Judge Harris' conduct toward the defendants on trial and toward their counsel was eminently tolerant, fair and impartial, that conduct is a matter for review by this Court upon an appeal on the merits of the *Bridges* case. The propriety of appellant's behavior, not that of the Court, is now the issue.

The *strenuousness* of Appellee's *assertion* with respect to the propriety of the conduct of Judge Harris is one of *words only*: words without stated reason in substantiation thereof. More accurately, that *strenuousness* finds its *entire existence and vitality* in the use of the one word "*strenuously*". The strength is verbal, not logical or even rational.

By what rationale could Appellee reach the conclusion and assert that the conduct of Judge Harris, in asking a defense witness a question of a character which Judge Harris, during the same trial, had repeatedly held to be improper when asked of prosecution witnesses (compare record 80 and 81 with the record 33 and OBFA 32 to 37) was “eminently * * * impartial”? By what rationale could Appellee reach the conclusion and assert that the conduct of Judge Harris in twice falsely stating in the presence of the jury that Appellant had invited Judge Harris to ask the question, the second time immediately following Appellant’s truthful disavowal (see record 33 and OBFA 43 to 49) thereby, in effect, *falsely* accusing Appellant of *lying* and of trying to deceive the jury, was “eminently * * * fair”?

Either Appellee made these *strenuous assertions* without giving real consideration to the conduct of Judge Harris, or in crass stupidity, or in cynical disregard of the truth and this Court’s perspicacity.

It is true that the propriety of the conduct of Judge Harris in the respects set forth in the opening brief for Appellant “is a matter for review by this Court on an appeal on the merits in the *Bridges* case.” But this is so *not* because the propriety of that conduct will be *the major issue*, or even *one of the major issues*, on that appeal, i.e. the *ultimate point*, or *one of the ultimate points*, for decision on that appeal. It is so because the propriety of that conduct will be a *minor issue* on that appeal, that is, because it will have *material relation* to *one of the major issues* on that appeal, namely: to the issue of whether the *judgments* in that case have the *legal infamy* of *prejudicial error* committed during the course of the trial which produced *those judgments*.

But it is not true, as intimated by Appellee, that because the propriety of such conduct will be “a matter for review by this Court on an appeal on the merits in the *Bridges* case” that it is not a matter for review *on this appeal*. On the contrary, the propriety of such conduct of Judge Harris is a matter for review on this appeal for *identically* the same reason that it will be a matter for review in the *Bridges* case, namely: because in this case, as in the *Bridges* case, it is a *minor issue*, that is: an issue having *material relation* to one of the *major issues*. In this case it has *material relation* to the *major issue* of whether the remarks of appellant *adjudged to be contemptuous were in fact contemptuous*; that is: whether the circumstances *existing* at the time they were uttered—including (1) the matters to which they were addressed, (2) Appellant’s understanding with respect to those matters and (3) Appellant’s purpose in making those remarks—did or did not *justify or excuse* Appellant in making those remarks.

In this respect, the statement of Mr. Justice Holmes in his dissenting opinion in *Toledo Newspaper Co. v. U. S.*, 247 U.S. 402, 423 (which opinion was later adopted by reference in the majority opinion in *Nye v. U. S.*, 313 U.S. 33, 52) that:

“Misbehavior means something more than adverse comment or disrespect.”

should be borne in mind, as should the Supreme Court’s statement in *Gompers v. Bucks Stove & R. Co.*, 122 U.S. 418, 444, that:

“* * * in proceedings for criminal contempt the defendant is presumed to be innocent,” and “he must be proved guilty beyond a reasonable doubt, * * *.”

See also *Boyd v. U. S.*, 116 U.S. 616.

The matters to which the remarks of Appellant were addressed included the two statements made by Judge Harris less that a minute previously, namely: "Mr. MacInnis invited it" and "Mr. MacInnis invited me to ask the question." They also included the statement made by Appellant between those two statements made by Judge Harris, namely: "I never heard of such a question."

As we hereinbefore pointed out, Judge Harris' statement "Mr. MacInnis invited me to ask the question" following, as it did, Appellant's statement that he had "never heard of such a question", in effect, *accused* Appellant of having *lied* when he made that statement. And, as that second statement of Judge Harris was made in the presence of the jury, it had the effect not only of accusing Appellant of lying *but also of telling the jury that Appellant was trying to deceive them.*

Had the two statements of Judge Harris been true, there could be no question but that the subsequent statements of Appellant, viz., "I think you should cite yourself for misconduct. I never heard anything like that. You should be ashamed of yourself", *in so far as they had reference to those two statements of Judge Harris*, would have constituted contempt.

But, as we have shown, those two statements of Judge Harris were absolutely false (OBFA 46, 47) and Judge Harris, at least after Appellant's intervening statement of disavowal, *must have known and realized* that they were false (OBFA 48, 49).

These things being so, Judge Harris' statement "Mr. MacInnis invited me to ask the question",

unquestionably constituted misconduct.* And not only misconduct but wilful misconduct of the most atrocious sort. Misconduct of the most atrocious sort in that, by telling the jury that Appellant was lying (when Appellant was in fact telling the truth), it had an irresistible tendency completely to discredit Appellant in the minds of the jury and thereby wrongfully and unconstitutionally deprive the defendants of Appellant's effective services as counsel and to make of Appellant a positive liability to those defendants. (See *Glasser v. U. S.*, 315 U.S. 60.)

Moreover, as "the Court" during the trial of a criminal case consists of "the judge" and "the jury", the wilfully false statements of Judge Harris in the presence of the jury were calculated to deceive that part of "the Court" which is "the jury" and thus to deceive "the Court" itself. This being so, such wilfully false statements constituted not only misconduct but misconduct amounting to criminal contempt of Court. (See *U. S. v. Ford*, 9 Fed. (2d) 990, cited by Appellee on pages 13 and 16 of its brief.)

Appellee contends that even if "the conduct and rulings" of Judge Harris "were erroneous Appellant had an adequate remedy of appeal" in the *Bridges* case "and was not thereby licensed belligerently to assail the authority and dignity of the Court and bring it into public disrepute". (BFA 11.)

*See this Court's decision in *Williams v. U.S.*, 93 Fed. (2d) 685, and the cases therein cited and quoted from, including:

Adler v. U. S., 182 F. 464, 472, 473;

Frantz v. U. S., 62 F. (2d) 737, 739;

Hunter v. U. S., 62 F. (2d) 217, 220, and

Quercia v. U. S., 289 U.S. 466, 470, 472.

These cases also reveal beyond question that Judge Harris was guilty of misconduct in his examination of Father Meineche and particularly in his asking Father Meineche the question "Have you been recently subjected to medical treatment, Father?"

First let it be observed that no *rulings* of Judge Harris were assailed by Appellant. The asking of the question by Judge Harris did not constitute a *ruling*. The statement "Mr. MacInnis invited it" did not constitute a *ruling*. Nor did the statement "Mr. MacInnis invited me to ask the question" constitute a *ruling*. Only *acts of conduct* of Judge Harris, as distinguished from the *rulings* of Judge Harris, were in *any wise* assailed by Appellant. For this reason the cases cited by Appellee on pages 16 to 19 of its brief are not in point for they all involved the disregard of rulings or the making of demonstrations against rulings.

It is true that it is the duty of counsel, during the course of a trial, to abide by the rulings of the Court and not to disregard or defy or protest or assail those rulings, but to wait to have them corrected on appeal, if erroneous.

But this rule *does not apply to acts of misconduct* by the judge of the Court. The right to protest, *and to openly charge that they are acts of misconduct, using that very word*, exists. Indeed, the duty to *assign such acts as misconduct* (in order to accord the Court an opportunity to undo the harm by proper admonitions), as a predicate for a claim of error on appeal, exists, although, in some instances, where to make such an assignment would increase rather than diminish the harm and prejudice, Appellate Courts have held that the lack of such an assignment of misconduct would not *foreclose* the raising of the point of misconduct on appeal. (See this Court's decision in *Williams v. U. S.*, *supra*, and cases therein cited.)

Had Appellant said to Judge Harris: "I assign your statements 'Mr. MacInnis invited it', and 'Mr.

MacInnis invited me to ask the question' as misconduct in this: that those statements are false in fact and that they, in effect, accuse me of having lied, and with having attempted to deceive the jury, when I truthfully stated that I had not heard of such a question; and I request that you inform the jury that those two statements of yours are untrue and that my statement is true" * * * had Appellant made such a statement to Judge Harris *he would have been entirely within his rights*, although such statement, being more pointed, and openly accusing Judge Harris of a twice stated falsehood, would have been much more offensive than the statements which Appellant did make, and would have brought Judge Harris much more certainly and much more quickly into "public disrepute".

Appellant's statement "I think you should cite yourself for misconduct", in effect, assigned the two statements of Judge Harris to be misconduct and requested that he undo the wrong by retracting those statement, in that an assignment of misconduct *by* Judge Harris would have been an admission of misconduct. Appellant's statement "I never heard of such a thing", being a repetition, in slightly different words, of his previous statement, "I never heard of such a question", clearly revealed that Appellant was making reference to the two statements of Judge Harris that Appellant had invited Judge Harris to ask the question. (The statement "I never heard of such a thing" is meaningless, without point or purpose, a *non sequitur*, unless such was its direction.) Appellant's statement "You should be ashamed of yourself" merely voiced Appellant's *righteous indignation* of having been falsely accused by Judge Harris, in the presence of the jury, of having lied

when he said that he had never heard of such a question.

Certainly Appellant, under these circumstances, had the right to make *some* form of *personal protest*, and, in that personal protest, to voice a measure of indignation. Appellant had been *personally* assailed by Judge Harris. His *personal* veracity, his *personal* integrity, had been *falsely impugned* by Judge Harris. Yet Appellee takes the position that all of this could have been corrected on an appeal in the *Bridges* case and that it was Appellant's duty, as an officer of the Court, to bow to, to acquiesce in, to accede to, this twice-stated falsehood of Judge Harris and to *ignore*, and, *by ignoring to appear to accept as deserved*, the *personal assault* which Judge Harris had made *upon Appellant's veracity and integrity*.

The law recognizes the right of self defense even in homicide cases. Does it make an exception where the one making the assault is a judge, and the one assaulted is an attorney in the trial of a case before that judge, and the assault is not only without provocation but is wilfully wrong and, unless resisted, inescapably injurious?

According to Appellee, the law does make such an exception. According to Appellee the more unprovoked such an assault is and the more wilfully wrong it happens to be, and the more damaging its result if unopposed, the more the attorney is duty bound *not to defend himself* because of the greater probability that the making of a defense, thereby exposing the wrong doing of the judge, will bring the Court "into public disrepute". Indeed, Appellee goes so far as to contend (BFA 16) that it is an attorney's "*paramount obligation*" to shield the judge under such

circumstances. "Paramount" means "superior to all others". Thus, Appellee contends that an attorney's obligation to shield the judge from criticism is superior to his obligation to himself, to his clients, to the cause of justice and to the law. Either this is Appellee's contention or Appellee is ignorant of the meaning of the word paramount.

Appellee would have this Court weigh the remarks of Appellant divorced from, indeed, *torn from*, their setting in the record. Appellee would have this Court consider those remarks without relation to the matters to which they were addressed and without regard to whether they were or were not in fact either justified or excused by what had preceded their utterance. Appellee would have this Court deny to Appellant the right to make a factual defense, *based upon the record*, although the judgment against him was issued without notice or hearing or any opportunity, prior to the issuance of that judgment, to make any showing or explanation or argument in defense or justification or excuse of his conduct.

But this is by no means the limit to which Appellee would have this Court go in order to sustain the judgment against Appellant. Appellee would not only have this Court consider the remarks of Appellant torn from their setting in the record but it would have this Court consider those remarks in the framework, and, as we shall show, the false and misleading framework, put around them by Judge Harris in the certificate which forms a part of the judgment.

On pages 12 and 13 of its brief Appellee makes this statement:

"In appraising appellant's behavior as described in the Court's certificate, consideration should be given not only to the language used by appel-

lant but also to Judge Harris' description of appellant's contemptuous demeanor, i.e., that he 'jumped to his feet, participated in a critical remonstrance of the Court' and that he addressed himself to the Court 'in a belligerent manner in the presence of the jury'."

And later on page 13 Appellee says:

"The insolent language used by appellant MacInnis in addressing the presiding judge, *coupled with appellant's belligerent manner*, unquestionably implied a purpose to flout the authority and dignity of the Court and to intimidate it in its administration of the law." (Emphasis added.)

In the opening brief pages 11 to 32 and 37, 38, 43 to 49 we pointed out that the certificate of Judge Harris was misleading both in certain of its declarations and by reason of certain material omissions. Such misleading items in the certificate would seem to cast doubt on its accuracy in other respects as well. Moreover, the characterizations of Appellant's demeanor to which Appellee calls attention *serve as a fill in where those material omissions occur*. This circumstance, again, would seem to cast doubt on the accuracy of those characterizations.

Let us now examine the three characterizations of Appellant's demeanor made by Judge Harris, and see to what extent they hold up under inspection.

The first is:

"Following such question, Mr. MacInnis jumped to his feet, * * *"

The expression "jumped to his feet" is what is known as an *hyperbole*, that is "a poetic or rhetorical *overstatement*; an *exaggeration*". The *unexaggerated* meaning is that appellant rapidly arose from a sitting

to a standing position. That is a characteristic movement of an attorney seeking to interpose an objection to a question which calls for a "yes" or "no" answer which, to be effective, must be interposed before the question is answered. *The question to which Appellant wished to object called for such an answer.*

Moreover, the record discloses that Vincent Hallinan was first to arise and start speaking and that Appellant did not address the Court until *after* (1) Mr. Hallinan had said seventy-seven words divided into five sentences *and* (2) Judge Harris had said fourteen words divided into two sentences and (3) Judge Harris said "Mr. MacInnis invited it." Consequently, the record makes indisputedly clear that there was no *precipitate* action by Appellant, such as is implied by Judge Harris in the declaration "Following such question, Mr. MacInnis jumped to his feet." In other words, such characterization of Appellant's demeanor is not only an exaggeration *but is a gross exaggeration.*

If Judge Harris would grossly exaggerate in this formal instance, *where any degree of exaggeration is wholly out of place and, literally, prejudicial*, is it not reasonable to assume that the companion declarations of Judge Harris are likewise and equally gross exaggerations? Where does exaggeration stop once it has started? And where there is a disposition to exaggerate is any statement to be taken without a liberal sprinkling of salt?

The next characterization, divided from "jumped to his feet" by no more than a comma, is this

"participated in a critical remonstrance of the Court, * * *"

Participate means: "to have or enjoy *a share in common with others*".

Only Appellant and Vincent Hallinan spoke to the Court. Thus, by the word *participated*, Judge Harris characterized what Vincent Hallinan said, as well as what Appellant said, as being a "critical remonstrance of the Court". Mr. Hallinan said:

"If the Court please, I am going to object to these questions. * * * I want to enter a legal objection. Your Honor has seen the Manning Johnsons, the Crouches, the Rosses and everybody get on that stand and we asked whether they were insane or not. I object to your Honor's question. I object to that last question and assign that as misconduct, and I ask that the jury be instructed to ignore the implication of the question."

Every word of this statement was proper and courteous. Again Judge Harris exaggerated. Grossly exaggerated.

Appellant's first remark to the Court was "I never heard of such a question." That was an oblique rather than a direct contradiction of Judge Harris' statement "Mr. MacInnis invited it". Being an oblique contradiction, it not only accorded Judge Harris an opportunity to retreat from falsehood to truth *but to do so with face-saving grace*.

Instead of retreating Judge Harris forged ahead, not only repeating the falsehood but repeating it under circumstances which made it an attack on Appellant's integrity. Did Appellant then commence a "critical remonstrance of the Court?" He did not. He again gave a *soft* answer, that is an answer which still left the way open for Judge Harris to retreat gracefully from falsehood to truth. What Appellant said was: "*Your Honor* refused to do that and I asked a question." The phrase "Your Honor" connoted respect, not disrespect, and the remaining

portion of the statement was anything but a critical remonstrance. It was only *after* Judge Harris shifted away from the question of whether Appellant had or had not invited Judge Harris to ask the question that Appellant's statements began to be stiffened and pointed.

This sequence of events did not indicate a disposition on the part of Appellant to engage in a "critical remonstrance of the Court". It indicated a disposition to conciliate Judge Harris, that is, by suggestion, to induce Judge Harris, without loss of face, to undo the wrong and the harm which he had just done. Thus we see that, also as applied to appellant, the characterization of "critical remonstrances of the Court" is an exaggeration. A gross exaggeration.

And the same thing is true in the case of the phrase "in a belligerent manner". Belligerent means warlike, pugnacious. It connotes a disposition to pick *and press* a fight. The record shows that after Appellant said the *twenty-two words* which Judge Harris adjudged to be contemptuous Appellant remained silent for over two transcript pages at which point a recess was taken without comment by Appellant.

There was nothing warlike about this. There was no continuing burst of machine gun fire or banzai charge. What Judge Harris should have certified was that Appellant addressed the Court in an "indignant manner". There is a vast difference between an *indignant manner* and a *belligerent manner*. And we freely concede that some *slight* measure of Appellant's *righteous indignation* crept into his tone of voice and facial expression as well as into his words. After all, Appellant is a human being and has the normal human sensibilities and emotional reflexes.

Thus we see that the framework which Judge Harris has put around the remarks of Appellant is a false and misleading framework.

As we hereinbefore said "Appellee would not only have this Court consider the remarks of Appellant torn from their setting in the record but would have this Court consider those remarks in the 'false and misleading' framework * * * put around them by Judge Harris in the Certificate which forms a part of the judgment." We do not believe that this Court will resort, or will be in the least bit tempted to resort, to such legalistic legerdemain, to such legalistic "now you do not see what is in fact present and now you do see what in fact is not present", to sustain the judgment against Appellant.

We have dealt with the unsubstantiated general denials of Appellee. Let us now deal with the unsubstantiated castigating denunciations. On page 13 of its brief Appellee says:

"* * * appellant proceeds to devote the bulk of his brief to a reiteration and amplification of his original contemptuous remarks, * * *"

And further on on page 13 Appellee says:

"By a tortuous process of specious reasoning, including strained interpretations of events occurring after the commission of the contempt, hypercritical definitions of the meanings of some of the words and phrases used by the trial judge, inferences bases upon inferences, and claimed innuendo hidden in the Court's innocent language, appellant purports to construct a factual basis for his charge that the presiding judge was prejudiced against the defendants in the Bridges case and sought to secure their convictions (Br. 10-55)."

Is it not strange, if all of these things are so, that Appellee is unable to point to so much as a single instance in substantiation of any one of them?

Actually such denunciations amount to little more than the calling of names for, except as to one instance, they give us nothing to answer except to say "We did not" in response to Appellee's "you did so." The one instance is the clause "hypercritical definitions of words and phrases used by the trial Judge." Definitions, whether hypercritical or not, can be identified and counted.

Between pages 10 and 55 of our opening brief (cited by Appellee) we attempted but *one* definition, that of the word "subjected" on page 15. The plural *s* to definitions is, thus, unadulterated wind used to blow up definition into definitions.

In that one definition we cited a standard dictionary giving all five of the clauses with which that word is defined. If this was a "*hypercritical* definition", then *all* dictionary definitions are *hypercritical*.

Appellee would have this Court hold, or infer, that Judge Harris meant something *other* than "subjected" when he used that word. But what? Appellee gives us no clue. And Appellee would have this Court infer that the jurors understood the meaning which Judge Harris intended. Again, what meaning? And Appellee would have this Court hold that appellant was being *hypercritical* in assuming that Judge Harris used the word "subjected" in its dictionary meaning. We are reminded of the conversation between Alice and Humpty Dumpty in "*Through the Looking Glass*" where Humpty Dumpty said:

"When *I* use a word * * * it means just what I choose it to mean—neither more nor less. * * *

The question is * * * which is to be master (the word or I) * * * When I make a word do a lot of work like that * * * I always pay it extra."

The castigating denunciations reach their apex on pages 29 and 30 of Appellee's Brief where it is said:

"We believe the following language in *Sachs v. Government of the Canal Zone*, 176 F. (2d) 293, 300 (C.A. 5), cert. den. 338 U.S. 858, used in affirming a sentence for criminal libel, *is singularly applicable to appellant's entire brief** in the subject case:

" 'In his attack upon the sentence, as distinguished from the conviction, the brief carries forward the same bitterness of attack, the same venom and anger, against the District Attorney. It does not put forward, as mitigating the offense, that appellant was acting in the heat of anger. He made no effort below, he makes none here, to apologize for his libelous charges or to explain them away on this ground. He made the attack in bitterness and resentment. He has continued it the same way. Complaining here of the sentence as unduly severe and asking its correction, he does not do so as an erring person convinced of his error and bringing forth fruits meant for repentance, but in anger and resentment. His brief states that he is a college graduate, a naval veteran, and that he has no previous record of crime. These facts show that he is not an underprivileged, illiterate and misled person, offending through ignorance, but a thoroughly informed one, who has knowingly offended and repents not. They make against him rather than for him when, with a vigorous determination to fight the matter out to the end in self-righteousness and as an accuser, he demands a reduction of his sentence instead of confessing his guilt and suing in repentance for a mitigation of its punishment.' "

*This emphasis ours.

What Appellee does not point out is that on the jury trial for criminal libel Sachs not only had the opportunity to put on evidence to prove that the libelous remarks were true and were published in good faith but that, after proof of the publication of those remarks by Sachs, the burden was upon Sachs to so prove in order to escape criminal responsibility, *and that Sachs offered no such evidence on such trial or on the subsequent presentence trial, when he again had the opportunity to offer evidence to prove such things.*

In this case, on the contrary, Appellant has had no trial, no opportunity to defend himself or explain his conduct, prior to or separate from this appeal, and all of his factual defense, except the Crouch and Michener incidents, is based upon that portion of the record in the *Bridges* case *which Judge Harris annexed to and made a part of the Certificate*, and the Crouch and Michener incidents are parts of the Bridges trial record, containing previous inconsistent rulings of Judge Harris, which are certified by the Clerk of the United States District Court.

These things being so, how could what the Court of Appeals said in the *Sachs* case, as quoted by Appellee, be “singularly applicable to Appellant’s entire brief” in this case or *in any way or degree* applicable?

It seems to us to be unmistakably apparent that these castigating denunciations, together with the references which Appellee makes to the two judgments for contempt imposed upon Vincent Hallinan during the same trial (BFA 4: neither one of which is final at this writing) and the reference to the two State Court contempt convictions of Vincent Hallinan (BFA 16, 17: one in 1925 and the other in 1932), were inserted

in Appellee's Brief *with the hope that they would find some lingering spark of prejudice or resentment among the members of this Court and would bellow it into a searing flame of rage and injudicious action. It seems to us self evident that these things constitute an appeal to passion and prejudice and not to reason and fair consideration.*

There are many other things in the brief for Appellee concerning which we would comment did space limitations permit. To commence a comment on any one of them, however, would run us over the twenty-page limitation. We trust that we will have time on oral argument to refute the ones which seem to need refutation.

Dated, San Francisco, California,
April 2, 1951.

Respectfully submitted,
WILLIAM F. CLEARY,
Attorney for Appellant.



No. 12601

United States
Court of Appeals
for the Ninth Circuit.

B. M. CRENSHAW,

Appellant,

vs.

TIGHE E. WOODS, Housing Expediter, Office of
Housing Expediter,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Montana.

FILED
AUG 30 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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E. F. BUNKER,

E. A. PETERSON,

Bozeman, Montana,

Attorneys for Appellant and Defendant.

In the District Court of the United States for the
District of Montana, Helena Division

No. 373

TIGHE E. WOODS, Housing Expediter, OFFICE
OF THE HOUSING EXPEDITER,
Plaintiff,

vs.

B. M. CRENSHAW and JANE DOE CRENSHAW, his wife,
Defendants.

COMPLAINT FOR INJUNCTION
AND RESTITUTION

Comes Now plaintiff and alleges:

I.

That plaintiff is the duly appointed and qualified Housing Expediter, Office of Housing Expediter, an agency of the United States Government, created by the Veterans' Emergency Housing Act 1821 et seq.) and brings this action as such Housing Expediter pursuant to the Housing and Rent Act of 1947 (50 U. S. C. A. App. Sec. 1881-1902) as extended and amended by Public Laws 422 and 464 of the 80th Congress, hereinafter referred to as the Act.

II.

That jurisdiction of this action is vested in the above-entitled Court under Sec. 206 (b) of the Act.

III.

That at all times hereinafter stated, the defendants, B. M. Crenshaw and Jane Doe Crenshaw, whose other or true name is not known, his wife, have been and now are the landlords and operators of a certain housing accommodation situated at 6 West Babcock, Bozeman, Montana, and located within the Bozeman Defense Rental Area. That said housing accommodation is commonly known as the Crenshaw Apartments. That in the judgment of the Housing Expediter the defendants have violated the provisions of the Act and of the regulations issued pursuant thereto, and will continue to violate such Act and such regulations by demanding, receiving and collecting [3*] from tenants occupying apartments in the housing unit hereinabove described rentals in excess of the maximum legal rents fixed and established by law for such apartments and housing accommodations, and have further violated the Act and the regulations by giving a 30 days notice of evictions to certain of their tenants who have refused to pay in excess of the maximum legal rents for the apartments they occupy.

*** Page numbering appearing at bottom of page of original Transcript of Record.**

IV.

That the violations hereinabove referred to are stated in detail as set forth in Schedule "A" attached.

Wherefore plaintiff prays:

1. That an injunction be issued against the defendants and each of them restraining and enjoining them, their agents and employees from demanding, receiving or collecting rentals in excess of the maximum legal rent from tenants occupying any and all of the apartments situated in the Crenshaw Apartments at 6 West Babcock, Bozeman, Montana, and that they be further enjoined and restrained from evicting or attempting to evict tenants who have refused to pay in excess of the legal ceilings in the apartments occupied by such tenants.

2. That the defendants be required to restore and refund to each of said tenants the overcharges as alleged in the Complaint, and

3. That plaintiff have and recover his costs and disbursements herein.

Dated at Seattle, Washington, this 2nd day of June, 1948.

/s/ ROY. C. FOX,

/s/ CLINTON J. CRANDALL,

Attorneys for Plaintiff. [4]

SCHEDULE "A"

Crenshaw Apartments, 6 West Babcock, Bozeman, Montana

Name of Tenant	Apart- ment	Period of Occupancy	MLR	Amt. Chgd.	Amt. O.C. per Mo.	Total O.C.
Major L. W. Konecki	14	Nov. 1-47 to and incl. June 1-48	\$45	\$75	\$30 for 8 mo.	\$240
Mrs. J. M. Ashmore	37	April 6-47 to Mar. 6-48	50	55	5 for 11 mo.	55)
Mrs. J. M. Ashmore	9	Mar. 6-48 to and incl. June 1-48	50	75	25 for 3 mo.	75) \$130
Mrs. John R. Durham	1	Sept. 1-47 to Mar. 1-48	50	100	50 for 6 mo.	300)
Mrs. John R. Durham	1	Mar. 1-48 to June 1-48 incl.	50	85	35 for 4 mo.	140) \$440
Leona Reeves, Clarice Reeves & Louise Ketter	24	April 1-48 to and incl. June 1948	65	75	10 for 3 mo.	30
R. H. Henke	17	Sept. 1-47 to and incl. June 1-47	40	55	15 for 10 mo.	150
Victor B. Barkley	8	April 8-48 to June 1-48	50	75	25 for 2 mo.	50
Joseph D. O'Neill	20	Jan. 15-48 to June 1-48	50	75	25 for 5 mo.	125
Mr. & Mrs. John Vallee	20	June 8-46 to Nov. 28-46	50	75	25 for 5 mo.	125
Mr. & Mrs. John Vallee	21	Nov. 29-46 to Aug. 20-47	50	75	25 for 9 mo.	225
Mr. & Mrs. John Vallee	16	Aug. 20-47 to June 1-48	55	*75	20 for 9 mo.	180
Mr. & Mrs. R. C. Gregar	21	Mar. 5-48 to June 1-48	50	75	25 for 3 mo.	75
Mr. & Mrs. E. A. Wilson	18	April 15-48 to June 1-48	50	75	25 for 1½ mo.	37.50
Mr. & Mrs. Carl Jones	48	April 10-48 to June 1-48	15	11.25 wk.	7.50 per wk. for 5 wks.	37.50
Priscilla Larson	36	Nov. 1-47 to June 1-48	40	65 per mo.	25 for 8 mo.	200.00
Mr. & Mrs. M. C. Davies	12	Nov. 1-47 to June 1-48	65	75	10 for 8 mo.	80.00

* Except March, paid \$55.

[Endorsed]: Filed June 7, 1948.

[Title of District Court and Cause.]

No. 373

ANSWER

Comes Now, B. M. Crenshaw, one of the above-named defendants and for answer to the complaint for injunction and restitution, admits, denies, and alleges as follows:

I.

Admits the allegations of paragraph one and two of said complaint.

II.

Answering paragraph three of plaintiff's complaint this answering defendant alleges that the operators of that certain building known as Crenshaw Apartments is the Trustee for the Mortgagor and its assigns; that this answering defendant is the agent only for said assigns, and further this answering defendant denies each and every allegation in said paragraph three contained and specifically denies that he is violating the regulations issued and denies that he will continue to violate such act as alleges in said complaint, and further specifically denies that his thirty (30) days notice of eviction was a violation of the act and especially denies that the thirty days notice was given to tenants who had refused to pay in excess of the maximum legal rents for the apartments, and alleges that the thirty days notice was given

pursuant to the thirty days of the State of Montana and such notices were within the rights of the affiant for the landlord. [8]

III.

Answering the allegations of paragraph four of plaintiff's complaint defendant denies each and every allegation therein contained.

IV.

This answering defendant demands a trial by jury in the above-entitled action.

Wherefore defendant prays:

1. That the plaintiff go hence and take nothing by his complaint.
2. That no injunction be issued.
3. That the defendant have and recover his costs and disbursements herein.

Dated at Bozeman, Montana, this 6th day of July, 1948.

E. F. BUNKER,
Attorney for Defendant.

[Endorsed]: Filed July 7, 1948.

[Title of District Court and Cause.]

No. 373

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came duly on for trial before the above-entitled Court on the 26th day of September, 1949, the Honorable W. D. Murray, United States District Judge presiding and sitting without a jury. C. E. Knowlton, Jr. appeared for the plaintiff and Eugene Bunker and E. A. Peterson appeared for the defendant, and Jane Doe Crenshaw having been dismissed from the action and evidence, both oral and documentary having been introduced and certain facts having been stipulated to by the parties and Briefs having been submitted, the Court being fully advised in the premises, now makes as its

Findings of Fact

1. That the plaintiff is and was at the time of the commencement of this action the duly appointed and qualified Housing Expediter.

2. That the defendant, B. M. Crenshaw, was landlord and operator of a certain multiple unit controlled housing accommodation located at 6 West Babcock, Bozeman, Montana, which accommodation was commonly known as the Crenshaw Apartments, and at the times of these Findings he rented and offered for rent such apartments within such housing accommodations.

3. That the defendant rented Apt. 1 in the Crenshaw Apartments to one John R. Durham from September 1, 1947, to October 31, 1947, at the rate of at least \$100 per month, and continued to rent such Apt. 1 to the said Durham at the rate of at \$85 per month from November 1, 1947, to June 1, 1948. [11]

4. That the rent registered by the defendant and now on file with the Office of Housing Expediter was being charged for Apt. 1 within the Crenshaw Apartments on July 1, 1945, and as reaffirmed by Order of the Rent Director of Bozeman on January 4, 1947, was \$35.00 per month.

5. That the defendant rented Apt. 8 in the Crenshaw Apartments to one Victor B. Barkley from April 8, 1948, to June 1, 1948, a period of $12\frac{2}{3}$ months, receiving from such tenant for such apartment at the rate of \$75.00 per month.

6. That an Order was issued by the Rent Director of Bozeman, Montana, applicable to Apt. 8 in the Crenshaw Apartments on February 20, 1947, fixing the rent for such apartment at \$50.00 per month furnished.

7. That the defendant rented Apt. 9 in the Crenshaw Apartments to one J. M. Ashmore from March 6, 1948, to June 1, 1948, a $2\frac{5}{6}$ month period, and charged such tenant for such apartment at the rate of \$75.00 per month.

8. That an Order was issued by the Rent Director for Bozeman applicable to Apt. 9 in the

Crenshaw Apartments on February 20, 1947, fixing the rent thereon at \$50.00 per month furnished.

9. That the defendant rented Apt. 12 within the Crenshaw Apartments to M. C. Davies from November 1, 1947, to June 1, 1948, and charged such tenant for such apartment at the rate of \$75.00 per month.

10. That an Order was issued by the Rent Director of Bozeman applicable to Apt. 12 in the Crenshaw Apartments on February 20, 1947, fixing the rent at \$65.00 per month.

11. That the defendant rented Apt. 14 within the Crenshaw Apartments to one L. W. Konecki from November 1, 1947, to June 1, 1948, 7 months and charged such tenant for such apartment at the rate of \$75.00 per month, which sum this tenant, by agreement and collusion with the defendant agreed to pay in exchange for the agreement of the landlord to provide such tenant with such additional services and equipment. [12]

12. That an Order was issued by the Rent Director for Bozeman applicable to Apt. 14 within the Crenshaw Apartments on February 20, 1947, fixing the rent at \$45.00 per month.

13. That the defendant rented Apt. 16 within the Crenshaw Apartments to one John Vallee on August 20, 1948, to June 1, 1948, a period of 9½ months and charged such tenant for such apart-

ment during such period at the rate of \$75.00 per month.

14. That an Order was issued on January 4, 1947, by the Rent Director for Bozeman applicable to Apt. 16 within the Crenshaw Apartments fixing the rent at \$55.00 per month furnished.

15. That the defendant rented Apt. 17 within the Crenshaw Apartments to one R. H. Henke from September 1, 1947, to June 1, 1948, 9 months and charged such tenant for such apartment at the rate of \$55.00 per month.

16. That an Order was issued by the Rent Director at Bozeman applicable to Apt. 17 within the Crenshaw Apartments fixing the rent applicable thereto at \$40.00 per month.

17. That the defendant rented Apt. 18 within the Crenshaw Apartments to one E. A. Willson from April 15, 1948, to June 1, 1948, 1½ months, and charged such tenant for such apartment at the rate of \$75.00 per month.

18. That the rent registered by the defendant as being charged on July 1, 1945, on file with the Office of Housing Expediter for Apt. 18 within the Crenshaw Apartments was \$50.00 per month.

19. That the defendant rented Apt. 20 within the Crenshaw Apartments to one Joseph D. O'Neill from January 15, 1948, to June 1, 1948, 4½ months, and charged such tenant for such apartment at the rate of \$75.00 per month.

20. That an Order was issued by the Rent Director for Bozeman applicable to Apt. 20 within the Crenshaw Apartments on June 26, 1947, fixing such rental at \$50.00 per month.

21. That the defendant rented Apt. 21 within the Crenshaw Apartments [13] to one John Vallee from July 20, 1947, to August 20, 1947, and demanded and received from such tenant rent at \$75.00 per month.

22. That the maximum rent applicable to Apt. 21 within the Crenshaw Apartments was \$50.00 per month.

23. That the defendant rented Apt. 24 within the Crenshaw Apartments to C. Reeves, L. Reeves and L. Ketter on April 1, 1948, to June 1, 1948, two months, and charged and received from such tenants rent at the rate of \$75.00 per month, which these tenants by agreement and collusion with the defendant agreed to pay in exchange for the agreement of the landlord to provide such tenants with additional services and equipment.

24. That an Order was issued by the Rent Director of Bozeman fixing the rent on Apt. 24 within the Crenshaw Apartments on February 20, 1947, at \$65.00 per month.

25. That the defendant rented Apt. 36 within the Crenshaw Apartments to Priscilla Larson from November 1, 1947, to June 1, 1948, and charged such tenant for such apartment at the rate of \$65.00 per month.

26. That an Order was issued by the Rent Director at Bozeman on February 20, 1947, fixing the rent on Apt. 36 within the Crenshaw Apartments at \$40.00 per month.

27. That the defendant rented Apt. 37 within the Crenshaw Apartments to one J. M. Ashmore from July 6, 1947, to March 6, 1948, and demanded and received from such tenant a consideration of \$55.00 per month during this period for such apartment.

28. That an Order was issued by the Rent Director at Bozeman on February 20, 1947, fixing the rent on Apt. 37 within the Crenshaw Apartments at \$40.00 per month.

29. That the defendant rented Apt. 48 within the Crenshaw Apartments to one Carl Jones from April 10, 1948, to June 1, 1948, and demanded and received from such tenants for such apartment rent at the rate of \$11.25 per week.

30. That an Order was issued by the Rent Director at Bozeman on [14] January 6, 1947, fixing the rent on Apt. 48 within the Crenshaw Apartments at \$15.00 per month, and from these Findings of Fact the Court makes the following:

Conclusions of Law

1. That plaintiff as Housing Expediter is entitled to maintain this action under and pursuant to the Housing and Rent Act of 1947, as amended.

2. That jurisdiction of this cause is conferred upon this Court by Sec. 206(b) of the Housing and Rent Act of 1947, as amended.

3. That the maximum rent for Apt. 1 within the Crenshaw Apartments is and was \$35.00 per month, and the defendant, by charging John R. Durham \$100 per month for September and October of 1947, and \$85 per month for the 7 months from November 1, 1947, to June 1, 1948, overcharged such tenant in the total amount of \$480.00.

4. That the maximum rent on Apt. 8 within the Crenshaw Apartments is and was \$50 per month and the defendant, by charging Victor B. Barkley the sum of \$75.00 per month for the $12\frac{2}{3}$ months involved, overcharged such tenant in the amount of \$41.50.

5. That the maximum rent on Apt. 9 within the Crenshaw Apartments is and was \$50 per month and the defendant, by charging J. M. Ashmore the sum of \$75 per month for the $2\frac{5}{6}$ months involved, overcharged such tenant in the total amount of \$70.80.

6. That the maximum rent on Apt. 12 within the Crenshaw Apartments is and was \$65 per month and the defendant, by charging M. C. Davies the sum of \$75.00 per month for the 8 months involved, overcharged such tenant the sum of \$70.00.

7. That the maximum rent on Apt. 14 within the Crenshaw Apartments is and was \$45 per

month and the defendant, by charging L. W. Konecki the sum of \$75 per month for the 7 months involved, overcharged such tenant the sum of \$210.00, but that this tenant is not entitled in the exercise of the sound equitable discretion of the Court to the refund of such sum by reason of his agreements and collusion with the defendant. [15]

8. That the maximum rent on Apt. 16 within the Crenshaw Apartments is and was \$55 per month and the defendant, by charging John Vallee the sum of \$75.00 per month for $9\frac{1}{3}$ months involved, overcharged such tenant in the sum of \$186.66.

9. That the maximum rent on Apt. 17 within the Crenshaw Apartments is and was \$40 per month and the defendant, by charging R. H. Henke the sum of \$55 per month for the 9 months involved, overcharged such tenant in the amount of \$135.00.

10. That the maximum rent on Apt. 18 within the Crenshaw Apartments is and was \$50 per month and the defendant, by charging E. A. Willson the sum of \$75 per month for the $11\frac{1}{2}$ months involved, overcharged such tenant the total sum of \$37.50.

11. That the maximum rent on Apt. 20 within the Crenshaw Apartments is reg. and was \$50 per month and the defendant, by charging Joseph D. O'Neill \$75 per month for the $4\frac{1}{2}$ months involved, overcharged such tenant the sum of \$112.50.

12. That the maximum rent for Apt. 21 within the Crenshaw Apartments is and was \$50 per month and the defendant, by charging John Vallee the sum of \$75 per month for the 1 month involved, overcharged such tenant in the amount of \$25.00.

13. That the maximum rent on Apt. 24 within the Crenshaw Apartments is and was \$65 per month, and by charging tenants Reeves, Ketter and Reeves the sum of \$75 per month for the 2 months involved, the defendant overcharged such tenants the total sum of \$20.00, but that these tenants are not entitled in the exercise of the sound equitable discretion of the Court to the refund of such sum by reason of their agreements and collusion with the defendant.

14. That the maximum rent on Apt. 36 within the Crenshaw Apartments is and was \$40 per month and by charging Priscilla Larson the sum of \$65.00 per month for the 7 months involved, the defendant overcharged such tenant in the amount of \$175.00.

15. That the maximum rent on Apt. 37 within the Crenshaw Apartments [16] is and was \$40 per month and the defendant, by charging J. M. Ashmore the sum of \$55 per month for the 8 months involved, overcharged that tenant the sum of \$120.00.

16. That the maximum rent on Apt. 48 within the Crenshaw Apartments is and was \$15 per

month and the defendant, by charging Carl Jones the sum of \$11.25 per week for the 6 weeks involved, overcharged such tenant in the sum of \$45.00.

Let Judgment for Injunction and Restitution for Overcharge Be Entered.

Done in Open Court this 21st day of February, 1950.

W. D. MURRAY,

United States District Judge.

[Endorsed]: Filed Feb. 21, 1950.

[Title of District Court and Cause.]

No. 373

JUDGMENT AND ORDER

This cause came duly on for trial before the above-entitled Court on the 26th, 27th and 28th days of September, 1949, and the Court having entered its Findings of Fact and Conclusions of Law herein, Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed that the defendant, B. M. Crenshaw, shall pay and restore to the following named persons the following sums which sums represent the amounts which this defendant has charged such persons in excess of the otherwise applicable maximum rents established under and pursuant to the Housing and Rent Act

of 1947, as amended, in connection with such defendant's operation of the housing accommodations located at 6 West Babcock, Bozeman, Montana, to wit:

Tenant	Amount
John R. Durham.....	\$ 480.00
Victor B. Barkley.....	41.50
J. M. Ashmore.....	190.80
M. C. Davies.....	70.00
John Vallee.....	211.66
R. H. Henke.....	135.00
E. A. Willson.....	37.50
Joseph D. O'Neill.....	112.50
Priscilla Larson.....	175.00
Carl Jones	45.00
Treasurer of the United States.....	230.00
	<hr/>
	\$1728.96

That the sum payable to the Treasurer of the United States represents moneys collected by this defendant in excess of the otherwise applicable [19] maximum rents from tenants whom the Court has found not entitled in equity and good conscience to receive restitution.

It Is Further Ordered that the defendant shall

pay the total of such sum referred to above or \$1728.96 by check or money order payable to the Treasurer of the United States at the Office of the Housing Expediter, 905½-3rd Avenue, Seattle, Washington, whereupon such sums shall be distributed by the Office of the Housing Expediter to the persons entitled thereto under the terms of this Order.

It Is Further Ordered, Adjudged and Decreed that the defendant is hereby restrained and enjoined, together with his agents and servants from charging or attempting to charge, rentals in excess of the otherwise applicable maximum rentals as established under and pursuant to the Housing and Rent Act of 1947, as amended, in connection with housing accommodation operated by this defendant and located at 6 West Babcock, Bozeman, Montana.

Plaintiff shall have and recover his taxable costs herein upon due notice to the defendant thereof.

Done in Open Court this 21st day of February, 1950.

W. D. MURRAY,

United States District Judge.

Presented by:

/s/ C. E. KNOWLTON, JR.

Attorney for Plaintiff.

[Endorsed]: Filed Feb. 21, 1950.

Entered & Noted in Civil Docket, February 23, 1950. [20]

[Title of District Court and Cause.]

No. 373

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice is hereby given that B. M. Crenshaw, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment and order entered in this action on the 21st day of February, 1950, and in which order it is set forth that the defendant, B. M. Crenshaw, shall pay and restore to the following named persons the following sums which sums represent the amounts which this defendant has charged such persons in excess of the otherwise applicable maximum rents established under and pursuant to the Housing and Rent Act of 1947, as amended, in connection with such defendant's operation of the housing accommodations located at 6 West Babcock, Bozeman, Montana, to wit:

John R. Durham.....	\$ 480.00
Victor B. Barkley.....	41.50
J. M. Ashmore.....	190.80
M. C. Davies.....	70.00
John Vallee.....	211.66
R. H. Henke.....	135.00
E. A. Willson.....	37.50
Joseph D. O'Neill.....	112.50
Priscilla Larson.....	175.00

Carl Jones	45.00
Treasurer of the United States.....	230.00
<hr/>	
Total	\$1728.96

That the sum payable to the Treasurer of the United States represents moneys collected by this defendant in excess of the otherwise applicable maximum rents from tenants whom the Court has found entitled in equity and good conscience to receive restitution. [171]

That the defendant shall pay the total of such sum referred to above or \$1728.96 by check or money order payable to the Treasurer of the United States at the Office of the Housing Expediter, 905 $\frac{1}{2}$ -3rd Avenue, Seattle, Washington, whereupon such sums shall be distributed by the Office of the Housing Expediter to the persons entitled thereto under the terms of this Order.

That the defendant is hereby restrained and enjoined, together with his agents and servants from charging or attempting to charge, rentals in excess of the otherwise applicable maximum rentals as established under and pursuant to the Housing and Rent Act of 1947, as amended, in connection with housing accommodation operated by this defendant and located at 6 West Babcock, Bozeman, Montana.

E. F. BUNKER,
ERNEST A. PETERSON,
Attorneys for Appellant.

[Title of District Court and Cause.]

No. 373

BOND ON APPEAL

Whereas, the above-named Plaintiff has secured a Judgment and Order in the District Court of the United States for the District of Montana, Helena Division, against the above-named Defendant for the direct payment of money from the Defendant in the sum of \$1,728.96 lawful money of the United States, payable to the Treasurer of the United States at the Office of the Housing Expediter, 905½-3rd Avenue, Seattle, Washington, besides interest, and said Defendant is about to file "Notice of Appeal" in the said action to the United States Circuit Court of Appeals, for the Ninth District at San Francisco, California.

Now Therefore, the undersigned, National Surety Corporation, a Corporation created and existing under the laws of the State of New York, in consideration of the premises and of the appeal, does hereby undertake in the sum of \$250 and promises to the effect, that if said Defendant shall dismiss said appeal or if the Judgment be affirmed, the said Defendant will pay costs that may be awarded

by the said Appellate Court, not exceeding the sum of \$250.

Dated this 20th day of April, A.D. 1950.

NATIONAL SURETY
CORPORATION,

By /s/ S. J. KAISLER, JR.,
Attorney in Fact.

Countersigned:

WAITE & COMPANY,

[Seal] By /s/ S. J. KAISLER, JR.,
Resident Agent.

[Endorsed]: Filed April 21, 1950. [174]

[Title of District Court and Cause.]

No. 373

ORDER EXTENDING TIME FOR FILING
AND DOCKETING RECORD ON APPEAL

Application having been made for extension of time for filing the record on appeal and docketing the appeal with the Appellate Court within forty days from the date of filing the Notice of Appeal herein; and good cause appearing therefore.

It is ordered that the time for the defendant, B. M. Crenshaw, for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the Ninth Circuit be extended to July 1, 1950, and that said defendant have such additional time for filing and docketing such record on appeal.

Dated at Butte, Montana, May 29th, 1950.

W. D. MURRAY,
District Judge.

Entered & Noted in Civil Docket May 31, 1950.

[Endorsed]: Filed May 29, 1950.

[Title of District Court and Cause.]

No. 373

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the above-named District Court:

You will please take notice that B. M. Crenshaw, the Defendant in the above-entitled action, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment and order entered in this action on the 21st day of February, 1950, in favor of the plaintiff and against the defendant above named and said defendant hereby requests a transcript of the pleadings and of the testimony and evidence offered and received, and the original exhibits, rulings or statements of the Court, also all objections and exceptions of counsel, a transcript of the Court's findings of fact and conclusions of law and the judgment and order rendered herein, be made up and prepared.

Dated this 15th day of June, 1950.

E. F. BUNKER,
E. A. PETERSON,

Attorneys for Defendant and Appellant, B. M.
Crenshaw.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 16, 1950. [178]

In the United States District Court, District of
Montana, Helena Division

No. 373

TIGHE E. WOODS, Housing Expediter, OFFICE
OF THE HOUSING EXPEDITER,
Plaintiff,

vs.

B. M. CRENSHAW and JANE DOE CRENSHAW, His Wife,
Defendants.

REPORTER'S TRANSCRIPT

Be It Remembered, that the above cause came on regularly for trial before the Hon. W. D. Murray, United States District Judge for the District of Montana, sitting without a jury, in the Court Room of said court in the United States Post Office Building, Butte, Montana, on the 26th, 27th and 28th days of September, 1949, Mr. C. E. Knowlton, Jr., Seattle, Washington, appearing as attorney for said plaintiff; and the defendant, B. M. Crenshaw, being present in person, and represented by his attorneys, Messrs. E. F. Bunker and Ernest A. Peterson, of Bozeman, Montana.

Whereupon, the following proceedings were had:

The Court: Cause No. 373, Tighe E. Woods, Housing Expediter, vs. B. M. Crenshaw? Has every effort been made to settle these matters in accordance with the agreement that was made in Missoula?

Mr. Knowlton: We did our best, your Honor. We attempted [22] to secure the necessary clearances that were necessary and were unable to do so.

The Court: You don't think there is anything further that can be done to settle the matter?

Mr. Knowlton: It had something to do with the Rent Advisory Board at Bozeman. Mr. Gaines, the Chairman, called two meetings of the Board, and Mr. Crandall of our Seattle office consulted with the Board by telephone and attempted to carry out the settlement and was unable to secure any clearances on it.

The Court: Very well, then, we will proceed with the trial. There are two cases here?

Defendants' Motion for Substitution
of Party Plaintiff

Mr. Bunker: At this time, on 373, your Honor, I don't believe there has been any motion on the part of the government or Tighe E. Woods to change this arrangement. As I understand it, Tighe E. Woods is no longer a Housing Expediter. Therefore, there is no plaintiff.

The Court: What is your position on that?

Mr. Knowlton: He is still Housing Expediter. It happens that on April 1, 1949, the Housing and Rent Act, on which both actions were predicated, was amended so as to require any new actions filed to be filed in the name of the United States. That

is why the other case is brought in the name of the United States. Under the rules there need not be any substitution of Woods in the first action. He was the person [23] authorized to bring the action. I believe the Court, if there was any reason for it, could order substitution of the United States as to the first cause of action, but I see no necessity for it.

The Court: Tighe E. Woods is still Housing Expediter?

Mr. Knowlton: That is correct, your Honor.

The Court: It is merely an amendment in the law with reference to the manner in which an action is to be commenced after April 1 of this year?

Mr. Knowlton: Yes.

The Court: Well, the Court sees no reason for amending or ordering a substitution of parties. Is that what your motion is?

Mr. Bunker: That was my motion, your Honor.

The Court: Your motion is denied.

Motion for Dismissal as to Defendant

Jane Doe Crenshaw Granted

Mr. Peterson: May it please the Court, I am attorney of record in 373 as attorney for Mrs. Crenshaw, and I have a letter from Mr. Knowlton to the effect he would move for dismissal as to Mrs. Crenshaw in this case this morning. I would like to know counsel's attitude.

Mr. Knowlton: I am agreeable to having Mrs. Crenshaw dismissed in Cause 373. I understand

the parties are divorced and she had nothing to do with it.

The Court: Very well. What is our situation with the two cases? Can they be consolidated for trial? [24]

Mr. Knowlton: I would like to move that they be consolidated. My witnesses will testify as to continuing acts which apply not only to the first cause of action, but to the second. The relationship is a little different on the two actions. However, I think there is no reason why they could not be more easily consolidated for trial and tried as if they were one case.

Mr. Peterson: In Cause 444, at this time or some subsequent time, I have in mind to move the Court for dismissal on the jurisdictional question which was raised and determined by Judge Shaw in the case of Woods against Shore Line Cooperative. Not that that case is controlling in this matter, but it is a case which arose in the Northern District of Illinois in the Seventh Circuit. The way I view 444, it is definitely under the 1949 amendment. I wish to raise a jurisdictional question on that. That is my attitude.

Mr. Knowlton: It would seem to me counsel could raise his legal objections as to any part of the two causes of action without making any difference in the trial of the facts of the actions.

The Court: Is the proof necessary in one case different from the proof in the other?

Mr. Knowlton: It varies slightly. Some of the witnesses will be the same, if the Court please.

The Court: I think we had better proceed separately. [25]

Mr. Knowlton: Very well.

The Court: Now, with reference to your jurisdictional attack in Cause No. 444, however, the Court would like to hear argument on that at this time before we open the trial of any cases. This is an opportune time to consider it. There is no use waiting until after we get into evidentiary matters. If you have a point, I would like to hear it at this time.

(Whereupon, a motion to dismiss was made in Cause No. 444, United States of America vs. B. M. Crenshaw, and argument made in support of said motion. A recess was taken until 2:00 o'clock p.m., the same day, September 26, 1949, at which time the following proceedings were had:)

The Court: You may proceed with Cause No. 373, and I would appreciate at the outset a statement as to the issues of the case.

Mr. Knowlton: If the Court please, the first cause of action was brought in the name of Mr. Woods, the party plaintiff, as Housing Expediter, and this action, the first cause of action, as is the second, is based upon the Housing and Rent Act of 1947. This Act in terms establishes maximum rents for housing accommodations in those areas

where rent control was in effect on June 30, 1947, under authority of the Emergency Price Control Act, and at such rates as such Emergency Price Control Act provided for such rentals. Now, to just outline the basis of maximum rentals as established under such Emergency Price Control [26] Act, they were established by regulation authorized by such Act. The plan of rent control was to select a date upon which rents were more or less normal in particular areas, and make the maximum rent as those rents that were charged on that date. By the regulation, the maximum rent date in Bozeman, the place where this particular violation is alleged to have occurred, is July 1, 1945. The maximum rent for all housing accommodations in that area became the rental charged on July 1, 1945, subject, of course, to adjustment by the Rent Director of such area. Mr. Crenshaw, it appears, has been operating a multiple unit accommodation at Bozeman, known as the Crenshaw Apartments. It is charged in the first cause of action in numerous cases, Mr. Crenshaw has charged rents in connection with such apartments more than the maximum rents provided for such (interrupted).

The Court: You refer to the first cause of action. Do you mean this cause, No. 373?

Mr. Knowlton: That is correct.

The Court: There is just one cause of action set forth in that?

Mr. Knowlton: It is alleged and set forth in a schedule the instances in which it is alleged Mr.

Crenshaw charged more than the maximum rents. The schedule is attached to that cause of action. There is only one cause of action set forth in the complaint, but there are two reliefs asked as a result [27] of this cause of action. The plaintiff asked as a first relief that he be enjoined—that the Court issue an injunction against Mr. Crenshaw, if the Court finds he has overcharged, enjoining him in the future from charging more than the maximum rents applicable to his accommodations in Bozeman. Secondly, the plaintiff asks, as to the first cause, No. 373, asks that the Court issue an order for the purpose of enforcing compliance with that act, to require the defendant to pay such sums as he may have already taken from the various persons that were his tenants or are his tenants, to repay and restore to them, as a means of enforcing such Act, such amounts as he has taken from them in excess of the otherwise applicable maximum rent. That is exactly what we have asked for in this first cause, Woods vs. Crenshaw. We will establish the maximum rents through the testimony of the Rent Director, and we will have a number of tenants here who will testify how much rent they paid for those accommodations.

The Court: Of the allegations in the complaint, which are put in issue by the answer?

Mr. Knowlton: I believe they all are. I believe the answer is merely a general denial.

The Court: A general denial of all the facts?

Mr. Knowlton: I might state in that connection,

we served upon the attorneys for the defendant a certain Request for Admissions under Rule 36, and Mr. Crenshaw was allowed to file [28] his answer in reply to such Request for Admissions. There is some of the facts which we will rely on and which are admitted in that answer or Reply to Request for Admissions. For example, for almost all the people in occupancy, Mr. Crenshaw has admitted the period for which they were in there. He, however, denies the amount of rent they were charged. In numerous cases as to the establishment of the maximum rent, he has admitted a lot of registrations, that is, what he registered as being charged on this maximum rent date, which he was required under regulation to register with the office in Bozeman. He has admitted the truth and veracity of such copies which were served upon him with the request. As to a few, he denied. As to certain orders which were sent in connection with it, he has denied it almost across the board.

The Court: Very well. Call the first witness.

Mr. Bunker: May it please the Court, it now appears to me that since this action was brought, the control Act under which it was brought has passed out of existence. The injunction relief depends upon that Control Act of 1947. Therefore, at this time, although the matter of the other relief might be before the Court, the injunctive relief, I believe, has passed out of existence, because it would depend upon the existence of that Act, not of the new Act.

The Court: If you wish to submit to the Court a written statement as to your position in that respect and give me any [29] authority you have, I will, of course, consider it before issuing any injunctive relief, if it appears injunctive relief would otherwise be granted.

LOUIS G. DeNAYER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Knowlton:

Q. State your name, please.

A. Louis G. DeNayer.

Q. Where do you reside, Mr. DeNayer?

A. Billings, Montana.

Q. What is your official position?

A. Area Rent Director.

Q. Where?

A. For Billings, Miles City, Livingston and Bozeman.

Q. How long have you been so employed and engaged? A. For the past four years.

Q. What are your duties as Rent Director, especially in connection with Bozeman?

A. I have charge of all of the records and files. I issue the orders when they are issued.

Q. In connection with Bozeman, is that correct?

A. Yes. [30]

(Testimony of Louis G. DeNayer.)

Q. Showing you Plaintiff's Exhibit 1 for identification, would you look at such document, and state what that is, if you know?

A. It is a file concerning Apartment 1, 6 West Babcock Street, Bozeman, Montana.

Q. Where did it come from?

A. It came from our files in Bozeman, Montana.

Mr. Bunker: To which we object (interrupted).

The Court: Has an offer been made?

Mr. Knowlton: An offer hasn't been made, if your Honor please. I just want you to see what it is, Mr. Bunker.

Q. Showing you Plaintiff's Exhibit 2 for identification, will you state what that is, if you know?

A. This is the file containing all of the file on Apartment 8 at 6 West Babcock at Bozeman, Montana.

The Court: I might inquire, counsel, don't you intend to offer these in evidence?

Mr. Knowlton: Yes, I was trying to speed things up by identifying the lot of them. I will offer them all at once.

The Court: I think it would be better to make your offer separately to each one as you come along.

Q. Showing you again Plaintiff's Exhibit 1 for identification, those are records of your office regarding apartment 1. What does the record show, Mr. DeNayer?

A. It shows that the registration was filed on

(Testimony of Louis G. DeNayer.)

April 16, [31] 1946, showing the maximum rent for the apartment 1 at \$35. Do you want the entire file?

Q. Is there an order issued changing such maximum?

Mr. Bunker: To which we object. The file is the best evidence.

The Court: Sustained.

Mr. Knowlton: I will offer Plaintiff's Exhibit 1.

Mr. Bunker: Objected to upon the grounds and for the reason that in the demand made by plaintiff in this action, the file shown for Exhibit 1, as handed to this attorney, shows that Apartment No. 1 was \$15.

The Court: How would that affect the admissibility of this? It might contradict it, but it doesn't affect its admissibility.

Mr. Bunker: He would be bound, I think, your Honor, by any exhibit he hands to me, and asks me to verify.

Mr. Knowlton: I think counsel is confused here. I think I can refer counsel to the number of the exhibit.

The Court: This Exhibit 1 is the official file in your custody?

The Witness: Yes.

The Court: It is the file upon which you make your determinations and upon which you rely in making your determinations with reference to your work in the Bozeman area, is it?

(Testimony of Louis G. DeNayer.)

The Witness: That's right.

The Court: With particular reference to this apartment? [32]

The Witness: Yes, sir.

The Court: The objection is overruled. Plaintiff's Exhibit 1 is admitted in evidence.

(Plaintiff's Exhibit 1, being Registration Statement for Apartment No. 1, 6 W. Babcock St., Bozeman, Montana, here received in evidence, will be certified to the Court of Appeals by the Clerk of the District Court.)

Mr. Bunker: Is that the original? May I take another look at that?

The Court: It is on the Clerk's desk.

Mr. Bunker: This Exhibit, your Honor, is further objected to, if I may ask to be permitted to make the objection——

The Court: Yes.

Mr. Bunker: ——upon the grounds and for the reason it isn't the original registration signed by this defendant. It is a copy and a typewritten signature put on it.

The Court: Where is the original?

The Witness: The original is in the files in this Court which was submitted in a suit which was filed against B. M. Crenshaw in 1947, I believe it was, and our attorneys did not ask to submit a copy.

The Court: The original was filed in Court in connection with another suit?

(Testimony of Louis G. DeNayer.)

The Witness: In another suit.

The Court: But this is the record on which you, as an official, [33] rely?

Mr. Bunker: It is objected to as not the best evidence; that the best evidence is available as being in this Court, if they wished to produce it.

Mr. Knowlton: If I might say something here. I think plaintiff has already admitted that this is substantially what is contained in the Exhibit by his answer to Request No. 24, in which he admits that Exhibit E is a copy of the registration statement filed in the Bozeman Defense Rental Area Office, except as to certain exceptions at Line 7, Section C, which he denies, but he admits it is a true copy of it, and I see no reason why he objects to it so far as the registration file—that is on page 4, line 20 of the Answers to Requests for Admissions.

Mr. Bunker: I admit that was a copy that was in the Defense Area Rent Office, but I don't admit it is the one signed by B. M. Crenshaw or that it is exactly the same as signed by B. M. Crenshaw. I merely admit that was the one in the Rent Office in Bozeman. That is as far as I go.

The Court: The original is available, is it not?

Mr. Knowlton: I frankly don't know of my own personal knowledge.

The Court: Are the originals for the others here?

Mr. Knowlton: Some of them are.

(Testimony of Louis G. DeNayer.)

The Court: If you have the originals, I think you should use them. [34]

Mr. Knowlton: I have not the original to Apartment 1. About my only purpose of offering that file is to show the order that is also attached to that file. The defendant has admitted that the pertinent provision regarding that registration—he has admitted that was what was filed in the Rent Office, which presumably becomes the maximum rent. He has admitted the original document we filed in there showing the maximum rent on the maximum rent date is \$35 a month. I would like at this time to inquire, Mr. DeNayer, whether such rent was changed by order. Is there any order in these documents showing any change of that maximum rent that was so registered?

A. There was a Docket I-66 of the Bozeman office, which was merely an order to establish the maximum rent at the registration rent, or a reaffirmation of the registration.

The Court: Don't your files contain the original of this document, what do you call it, registration?

The Witness: Registration statement.

The Court: Does the file contain the original?

The Witness: It contains the original with the exception of the ones that were in another action that was brought against Mr. Crenshaw and our attorneys failed to substitute copies for the originals after the trial.

(Testimony of Louis G. DeNayer.)

The Court: Those records are in the files of this Court?

The Witness: Of this court. [35]

The Court: I think that we should have the originals here, or at least an explanation of why they are not available. Now, we can get the original of this document of registration.

Mr. Knowlton: I assume if they are any place, they will be in Helena.

The Court: The Court will make a proper order for that, if you will prepare a proper order for the Clerk. If you will get the name and number of the case, I can make a proper order and have them transferred here so that we can have them and have them introduced in evidence. For the time being, and in order to proceed, I will overrule the objection so that we may proceed, but I will expect counsel, at the proper time, to bring in the original records and substitute them for the copies that are here presented.

Q. (By Mr. Knowlton): I have changed, Mr. DeNayer, Plaintiff's Exhibit 2, and hand you a single piece of paper. Would you state what that is, if you know?

A. This is an order determining the maximum rent of Apartment 8 at 6 West Babcock Street at Bozeman, Montana.

Q. Is that the original of such instrument?

A. This is the original.

Q. Where is it from?

(Testimony of Louis G. DeNayer.)

A. It is from Bozeman.

Q. Has there been any changes in the orders affecting the apartment you mentioned? [36]

A. The order shows that the Director finds that the rent on the maximum rent date was \$35.00 per month, unfurnished, which amount is the maximum rent for the above-described accommodation. The maximum rent for the above furnished accommodation is fixed at \$50.00 per month, the rent which the Rent Director finds was the rent generally prevailing in this Defense Rental Area for comparable housing accommodations on the maximum rent date. This order is effective to establish the maximum rent as of March 1, 1946.

Q. Has there been any order changing it or altering it?

A. There has been no order to my knowledge changing it.

Q. If there was any such order, where would it be?

A. It would be in the files.

Q. That is the full file—state what that is?

A. This includes the original registration statement filed by Crenshaw, which shows the rent on the maximum rent date to have been \$35.00 per month. It also shows (interrupted).

Q. Was there any order changing the rent after that?

A. No.

The Court: Is the document that you have been referring to, the order, is that marked as an Exhibit?

(Testimony of Louis G. DeNayer.)

Mr. Knowlton: That is correct, your Honor.

The Court: What Exhibit is it?

Mr. Knowlton: Exhibit 2.

The Court: Exhibit 2, very well. [37]

Q. Has there been any lease in the records of your office—is there any later action concerning that apartment?

A. There has been no leases filed.

Q. In connection with any apartment.

A. In connection with any apartment in the Crenshaw apartments.

Mr. Bunker: You testified as to this Exhibit 2 that this was a part of your files as Rent Director?

The Witness: That is part of the files that are in my custody.

Mr. Bunker: In find that this order, Exhibit 2, on Apartment 8, is signed by H. C. Harlen, Rent Director, February 20, 1947.

The Witness: That is correct, sir.

Mr. Bunker: Pardon.

The Witness: He was Rent Director at that time.

Mr. Bunker: You didn't have anything to do with that?

The Witness: Not with the order.

Mr. Bunker: Beyond what is in your files, you don't know?

The Witness: That's right.

Mr. Bunker: Do you know Mr. Harlen's signature if you saw it?

(Testimony of Louis G. DeNayer.)

The Witness: I do.

Mr. Bunker: Will you examine Exhibit 2 and say whether or not that is his signature?

The Witness: Yes, it is Mr. Harlen's signature.

Mr. Knowlton: Offer Plaintiff's Exhibit 2 in evidence. [38]

Mr. Bunker: Objected to as not properly identified.

The Court: In what respect isn't that identified?

Mr. Bunker: In that Mr. DeNayer is Rent Director for that area, not Mr. Harlen.

The Court: Overruled.

Mr. Bunker: He has testified that at all times he was Rent Director of that area.

The Witness: No, I did not.

(Plaintiff's Exhibit 2, being Order fixing rent on Apartment 8, 6 W. Babcock St., Bozeman, Montana, here received in evidence, will be certified to the Court of Appeals by the Clerk of the District Court.)

Q. (By Mr. Knowlton): Showing you Plaintiff's Exhibit 3, would you state what that is?

A. That is an order determining the maximum rent on Apartment 9 at 6 West Babcock, Bozeman, Montana.

Q. Would you state after looking at the file in connection with Number 9, whether there was any order changing the rent that Plaintiff's Exhibit 3 fixed? A. No, there was no other order.

(Testimony of Louis G. DeNayer.)

Q. Do you recognize the signature that instrument bears?

A. It was signed by H. C. Harlen.

Q. Do you know that to be his signature?

A. I know that to be his signature.

Q. That rent has not been changed?

A. That rent has not been changed. [39]

Mr. Knowlton: I offer Plaintiff's Exhibit 3 in evidence.

Mr. Bunker: Objected to as there is no showing here that any registration of Apartment 9 was ever made or that Apartment 9 was ever under Rent Control beyond this office memorandum. Objected to as incompetent, irrelevant and immaterial.

The Court: Counsel, what authority does the Rent Director have to fix the maximum rent without the property having been registered? Is counsel's objection that the property has to be registered first, that is, there would have to be a showing the property was registered before an order establishing maximum rent could issue, isn't that right?

Mr. Knowlton: I don't believe so, your Honor. Could I see that? Registration was required to be made, if your Honor please, of the landlord's ex parte statement of what he was charging on the maximum rent date. The rent Director had the authority to issue such orders of determination of what the comparable maximum rent should be under Section 5(d) of the Regulations issued under the Emergency Price Control Act, which were the

(Testimony of Louis G. DeNayer.)

regulations in effect at the time these orders were issued. That regulation provided, "if the rent on the date determining the maximum rent, or any other fact necessary to the determination of the maximum rent, or the services, furniture, furnishings or equipment provided with the accommodations on the date determining the maximum rent, is in dispute between the landlord and the tenant, or is in doubt, or is not known, [40] the Housing Expediter, on petition of the landlord filed within thirty days after the effective date of regulation, or at any time on his own initiative, may enter an order fixing the maximum rent by determining such fact, or determining the services, furniture, furnishings, and equipment provided with the accommodations on the date determining the maximum rent or both. If the Housing Expediter is unable to ascertain such fact, or facts, he shall enter the order on the basis of the rent which he finds was generally prevailing in the defense rental area for comparable housing accommodations on the maximum rent date and where appropriate, may determine the services, furniture, furnishings and equipment included in such rent."

The Court: The right of the Rent Director to determine the maximum rent doesn't depend upon any registration? The registration just assists him in fixing the maximum rent?

Mr. Knowlton: That is correct. Under the Emergency Price Control Act, if a landlord would

(Testimony of Louis G. DeNayer.)

refuse to register or it was impossible to get the landlord to register, the regulation tried to circumvent that, at least tried to make it easier upon the Housing Expediter and the Courts by providing for a direct order establishing rents, and where in cases, for some reason, a landlord would not register or could not register the rent or any other fact that was necessary for the determination, or maybe he didn't even know what the maximum rent was on the maximum rent date. [41]

The Court: For the Court's information, were these apartments registered or not?

Mr. Knowlton: I think they were, most of them.

Mr. Bunker: They were, yes. Everyone of them was registered. This paper purports to jump over what the original registration was, and all it shows, it is merely a subsequent order without foundation.

Mr. Knowlton: If counsel is objecting to the order or its validity, he should make some showing, which he has not done, that Mr. Crenshaw has exhausted his administrative remedies by way of appeal under the Emergency Price Control Act or the appeals as provided in this Act. There are administrative procedures allowed for any landlord that might want to appeal.

Mr. Bunker: That hasn't been shown to be issued in response to any objection. This is simply an order they placed in their files, as it appears on its face.

Mr. Knowlton: It appears on its face, I believe (interrupted).

(Testimony of Louis G. DeNayer.)

The Court: Mr. Harlen was Rent Director in Bozeman at the time of the issuance of this order?

The Witness: Yes. It shows a copy was deposited in the United States Mail at a certain time.

The Court: This was an official record of the rent Director's Office, of which you have custody?

The Witness: Yes, sir. [42]

The Court: The objection is overruled.

(Plaintiff's Exhibit 3, being Order fixing rent on Apartment 9, 6 W. Babcock St., Bozeman, Montana, here received in evidence, will be certified to the Court of Appeals by the Clerk of the District Court.)

Q. (By Mr. Knowlton): Showing you Plaintiff's Exhibit 4 for identification, will you state what that is?

A. This is an order determining the maximum rent on Apartment 12 at 6 West Babcock Street, Bozeman, Montana.

Q. What day is that order—does that order purport to be issued?

A. The order was issued February 20, 1947, and a copy of the original was deposited in the United States Mail on that date.

Q. Do you know whether, according to the records and files of the Bozeman Office, any orders changing the rent of this last mentioned apartment have been issued by the Rent Director are found in such files? A. No.

(Testimony of Louis G. DeNayer.)

The Court: There has been no change?

The Witness: No.

Mr. Bunker: May I ask a question?

The Court: Yes, proceed.

Mr. Bunker: Mr. DeNayer, this order is dated February 20th, is that correct?

The Witness: That is correct, sir.

Mr. Bunker: And the original registration was made in [43] April, one year before that, that is, in 1946. This is February 20, 1947, is that correct?

The Witness: That would show. Yes, that is correct.

Mr. Bunker: That would make it as of March 1, 1946. Why don't you have the original application registration signed by Mr. Crenshaw?

The Witness: I don't hear you?

Mr. Bunker: Why do you not have that in place of this order, which is an order by Mr. Harlen made nearly a year later?

The Witness: That is very likely one of them that is in the files on that last action we had.

Mr. Bunker: May I have an objection to the entry of all of these orders by the Area Rent Director at this time, in that they are not the best evidence; as to any offer of this type, that this type evidence offered is not the best evidence.

The Court: Hand me the exhibit.

Mr. Bunker: And in that the proper foundation for offering that evidence has not been laid.

The Court: In what particular is the foundation lacking?

(Testimony of Louis G. DeNayer.)

Mr. Bunker: In that the foundation to that order is the registration, and this order is an order made without the consent, knowledge or anything else of the defendant.

The Court: This is the official order of the Rent Director, and as such, it is admissible. Now, the registration, or any other document in connection with it is available to you, sir. [44]

Mr. Bunker: I have it, but I do not have this. That information hasn't been received by the defendant, your Honor.

The Court: But that doesn't make it inadmissible here. You can establish that if that is of any importance. You have the official registration?

Mr. Bunker: I have a copy of it.

The Court: And the original itself will be made available to you, or its absence will be explained to you. That is all you are entitled to. This is an official document. Your objection is overruled. I would advise you to make objection to each offer made.

Mr. Knowlton: I offer it in evidence.

The Court: Plaintiff's Exhibit 4 is admitted in evidence.

(Plaintiff's Exhibit 4, being Order fixing rent on Apartment 12, 6 West Babcock St., Bozeman, Montana, here received in evidence, will be certified to the Court of Appeals by the Clerk of the District Court.)

(Testimony of Louis G. DeNayer.)

Q. (By Mr. Knowlton): Showing you Plaintiff's Exhibit 5, would you examine that file and state what that purports to be, if you know?

A. This is the file concerning Apartment 14 at 6 West Babcock Street, Bozeman, Montana.

Q. Does that file indicate any order has been issued concerning that apartment?

A. No order has been issued.

Q. Calling your attention to the revised copy of the registration, [45] will you examine that, please?

A. Do you want me to explain this?

Q. Would you state whether there is anything in that file indicating any orders have been issued concerning Apartment 14?

A. Yes, the maximum rent was changed.

Q. What does the file show concerning any such change?

A. It shows the maximum rent of \$45.00 per month, furnished, was the determination of the legal maximum rent under Section 5(d).

Q. Where is that information found on that document?

A. It is found on the back of the registration statement.

Mr. Knowlton: Offer Plaintiff's Exhibit 5 in evidence.

The Court: What is the purpose of the whole file, counsel?

Mr. Knowlton: In that particular case, if your Honor please, the change is indicated on the back

(Testimony of Louis G. DeNayer.)

of the revised copy of the registration, which is one of the first papers in the file, indicating it was made at a date subsequent to the issuance of the original registration, which is also in the file.

The Court: The important matters are the registration and the change made?

Mr. Knowlton: That is correct.

The Court: Why should we clutter the files of this Court up with all the extraneous records. Segregate it and have them [46] identified.

Q. Showing you first of all Plaintiff's Exhibit 5 for identification, I will ask you what that is, if you know?

A. This is the original registration of Apartment 14 at 6 West Babcock Street, Bozeman, Montana.

The Court: Is that marked 5 or 6?

Mr. Knowlton: 5-A, I am sorry.

Q. Showing you Plaintiff's Exhibit 5, will you state what that is?

A. That is a copy of the original of the registration statement on Apartment 14 at 6 West Babcock Street in Bozeman.

Q. If you will turn over the copy, will you state what is on there?

A. This shows that an order was issued by the Rent Director determining the legal maximum rent of Apartment 14 at \$45.00 per month furnished.

Mr. Knowlton: Offer Plaintiff's Exhibits 5 and 5-A.

Mr. Bunker: No objection to 5—to 5-A. The

(Testimony of Louis G. DeNayer.)

objection to Exhibit 5 is that it is a statement wholly within the knowledge of the Rent Director and not binding upon the defendant, and is not the best evidence of any notice to him of any change of rents and there is no foundation laid for introducing this secondary evidence.

The Court: Exhibit 5-A will be admitted without objection, and Exhibit 5—Exhibit 5-A, there was no objection, is that it? [47]

Mr. Bunker: There was no objection to the last one. Yes, there is no objection to that. Exhibit 5 is the one that is objected to.

The Court: Exhibit 5-A, the last one you saw, you have no objection to that?

Mr. Bunker: No objection to that one.

The Court: Very well, it will be admitted without objection.

(Plaintiff's Exhibit 5-A, being Registration Statement on Apartment 14, 6 W. Babcock St., Bozeman, Montana, here received in evidence, will be certified to the Court of Appeals by the Clerk of the District Court.)

The Court: With reference, Mr. DeNayer, to Plaintiff's Exhibit 5, this likewise is an official document in your custody?

The Witness: Yes, sir.

The Court: And it is one upon which you, as Rent Director, rely in performing your official duties?

(Testimony of Louis G. DeNayer.)

The Witness: That is true, that is a true and correct copy of the original.

The Court: The information contained therein is information upon which you act as Rent Director?

The Witness: That is true.

The Court: Very well, the objection with reference to Plaintiff's Exhibit 5 is overruled, and it is admitted in evidence.

(Plaintiff's Exhibit 5, being Order fixing rent on Apartment 14, 6 W. Babcock St., Bozeman, Montana, here received in evidence, will be certified to the Court of Appeals by the Clerk of the District Court.) [48]

Q. (By Mr. Knowlton): Showing you Plaintiff's Exhibit 6 for identification, will you state what that is, if you know?

A. This is a copy of the registration of Apartment 16 at 6 West Babcock Street, Bozeman, Montana.

Q. Does that document show any change in the rent so registered in your office?

A. Yes, it shows an order was issued by the Rent Director determining the legal maximum rent under Section 5(c) was \$40.00 per month unfurnished and \$55.00 per month furnished.

Q. Do you know of any order changing that rental on that apartment?

A. No, there is no order changing it.

(Testimony of Louis G. DeNayer.)

Mr. Bunker: Objected to as not the best evidence. It is not the original registration, it is merely a copy, no foundation having been laid for using a copy instead of an original.

Q. Is this one of the records you have used during—in your position as Area Rent Director in Bozeman? A. Yes, sir.

Q. To fix the rents? A. Yes, sir.

Q. And it is a record of your office?

A. Yes, sir.

Mr. Knowlton: I offer Plaintiff's Exhibit 6 in evidence.

Mr. Bunker: Same objection.

The Court: This is marked a duplicate, Mr. DeNayer. Where is [49] the original?

A. Is that 16? I am not sure. This must be done of the originals that was used in another case.

The Court: The original would otherwise be contained in your file?

The Witness: That is true.

The Court: But, it isn't there, and this is a true and correct copy?

The Witness: A true and correct copy certified.

The Court: The original was introduced into the Court files on a hearing on another matter?

The Witness: That's right.

Mr. Bunker: May I inquire, your Honor?

The Court: Yes.

Mr. Bunker: Where is the original, do you know, Mr. DeNayer?

(Testimony of Louis G. DeNayer.)

The Witness: It is likely in the Court files.

Mr. Bunker: That apartment has never been in question before. It is the northeast corner apartment.

The Witness: I don't know. It was taken with the files, and it must be there. That can be determined by the Court.

The Court: If it isn't in the Court files, do you know where else it is?

The Witness: It would be here in our files or in the Court files. [50]

The Court: If it is not in the Court files and your examination shows it is not in your files, you cannot otherwise explain its absence?

The Witness: That's right.

Q. (By Mr. Knowlton): Mr. DeNayer, do you know in the event that such an instrument as Exhibit 6 is lost, is that a copy of such instrument that you have in your records?

A. If it is lost?

Q. That it is a copy of the original?

A. That is a copy of the original.

Mr. Bunker: That is a self-serving declaration and is speculative entirely, and the defendant does not have to be bound by such speculation.

The Court: The defendant is not bound by any testimony of the plaintiff's witnesses.

Mr. Bunker: I understand, but we don't want any part of it.

(Testimony of Louis G. DeNayer.)

The Court: The Plaintiff's Exhibit No. 6 is an official record in your custody?

The Witness: Yes, sir.

The Court: It was made in the usual course of business of the Rent Director?

The Witness: Yes, sir.

It is a record upon which you rely in dealing with your official duties as Rent Director? [51]

The Witness: Yes, sir.

The Court: The objection is overruled.*

Q. (By Mr. Knowlton): Showing you Plaintiff's Exhibit No. 7 for identification, will you state what that is?

A. This is a true and correct copy of the registration statement of Apartment 17 at 6 West Babcock, Bozeman, Montana, and it shows that an order determining the legal maximum rent (interrupted).

Mr. Bunker: I don't believe the evidence on the fact of these exhibits should be explained beforehand. Of course, I understand this is an equity case.

The Court: The Court can, of course, read the Exhibit and tell what its contents is, so you needn't read it to me. I can read it myself, Mr. DeNayer, but you can tell what the document is. Proceed.

*Plaintiff's Ex. 6, Registration Statement for Apartment 16, here received in evidence, will be certified to the Court of Appeals by the Clerk of the District Court.

(Testimony of Louis G. DeNayer.)

Q. Have you got the original copy of that registration in your files?

A. I don't know whether it is in the files here or not. Yes, the original registration statement is in the files.

Q. Will you compare the copy you have there?

A. It is Apartment 17—they are the same.

Mr. Knowlton: I will offer Plaintiff's Exhibits 7 and 7-A.

Mr. Bunker: No objection to the exhibit.

The Court: Well, did you say that Exhibit 7 is an exact duplicate of Exhibit 7-A? [52]

Mr. Knowlton: Let me take a look.

The Court: What is the purpose of offering the original and a duplicate?

Mr. Knowlton: The purpose is that the duplicate indicates a change by order on the reverse side of it.

The Witness: The duplicate was used because this one was voided for the reason that (interrupted).

Mr. Knowlton: As a matter of fact, he shows the maximum rent of \$40 charged as of the maximum rent date. He then shows he increased it to \$50 at some date after as the result of having an additional occupant. That may be a reason for the Rent Director to change it, but there is no authority any place where he can change the maximum rent by himself and because of his own statement.

The Court: The original sets forth that \$50.00 is the maximum rent?

(Testimony of Louis G. DeNayer.)

Mr. Knowlton: If your Honor will let me see this. The original shows Mr. Crenshaw rented this Apartment 17 on the maximum rent date at \$40.00 per month. He then shows that an extra person moved in there, and for that reason on February 19, 1946, he increased the rent to \$50.00. This is an ex parte statement made by Mr. Crenshaw in connection with such accommodation. A person never had authority to increase the rent otherwise applicable by reason of an extra person. In fact, he has crossed out, if your Honor will observe, an indication [53] showing from "Fully furnished to unfurnished" and inserted his own reason for increasing the rent.

The Court: Well, the Exhibit 7 is not a duplicate of 7(a)?

Mr. Knowlton: No, because 7-A was voided, if your Honor please. It is marked "voided" by the Rent Director. He couldn't accept it as establishing the maximum rent at \$50.00. The maximum rent was established at what was charged on the maximum rent date.

The Court: You are offering 7 as a duplicate of 7-A. It isn't a duplicate of 7-A. Exhibit 7-A is different and it appears on its face to be different. The point that I want to find out is why offer 7-A. What is it?

Mr. Knowlton: It is actually nothing, I don't suppose, and should not be offered at all. If your Honor please, it is a voided registration.

(Testimony of Louis G. DeNayer.)

The Court: If that is voided, what is Exhibit 7?

Mr. Knowlton: Number 7 was—the Rent Director apparently, in making up his copy, took the fact of what the rent was on the maximum rent date as reported by the landlord, set it up on his copy and voided the original registration so it wouldn't get mixed up in his files.

The Court: That is fine, if you will just have someone testify to it instead of you talking about it.

Mr. Bunker: About the difference, 7-A was the one I intended to allow. I misread, I didn't know there were two there. [54]

Q. (By Mr. Knowlton): Will you re-examine and look carefully at Exhibit 7 and 7-A, compare them as to all material respects and explain any differences, if there are any, and why they were made?

A. The rent on the maximum rent date on the original registration was \$40.00. The rent on the maximum rent date on the duplicate registration was \$40.00. Exhibit 7 was voided—or 7-A was voided by our office for the reason that the landlord added his own reasons for increasing the rent. That is not on Exhibit 7, but so far as the rent on the maximum rent date is concerned, it is the same on both copies. On the reverse side of the duplicate copy which we use in our work, as this other one was voided, there was a determination and order issued by the Rent Director determining the legal maximum rent to be \$40.00 per month, furnished, for Apartment 17.

(Testimony of Louis G. DeNayer.)

The Court: Plaintiff's Exhibit 7 is the duplicate?

The Witness: That is correct.

The Court: Could you tell me what happened to the original of that?

The Witness: We never had an original to this.

The Court: In other words, you never had an original executed by the defendant?

The Witness: Not executed by the defendant, with the exception of this one, which we voided. He was also informed any time we voided one. [55]

The Court: Exhibit 7 was made completely from the information contained in Exhibit 7-A?

The Witness: Yes, sir.

The Court: And was made by the Rent Director?

The Witness: By the Rent Director.

The Court: And Exhibit 7 is an official document under your custody as Rent Director?

The Witness: That is correct.

The Court: And was made in the usual course of business and is a record upon which you rely in performing your official duties as Rent Director?

The Witness: That is true.

Mr. Bunker: May I add the further objection, your Honor, the Exhibit 7 shows upon its face to have been signed by B. M. Crenshaw. He now states it wasn't. It isn't a copy and is of no probative value in this matter. It is a matter that is self-serving entirely.

(Testimony of Louis G. DeNayer.)

The Court: Exhibit 7 shows what the Rent Director found to be the maximum rent?

The Witness: That's right.

The Court: And includes on its reverse side an order changing that maximum rent?

The Witness: Just re-affirming what was on the face of it.

The Court: The Exhibit 7 purports to have been signed by B. M. Crenshaw. What do you have to say as to that? [56]

The Witness: That was taken from his original to show that he actually registered the rent on the maximum rent date for \$40.00. That is why the two were kept together, although that one was voided.

The Court: Very well, the objection is overruled. Exhibits 7 and 7-A are admitted.

(Plaintiff's Exhibit 7, being duplicate registration statement on Apartment 17, 6 W. Babcock St., Bozeman, Montana, and Plaintiff's Exhibit 7-A, being registration statement on Apartment 17, 6 W. Babcock St., Bozeman, Montana, here admitted in evidence, will be certified to the Court of Appeals by the Clerk of the District Court.)

Q. (By Mr. Knowlton): Will you look at Plaintiff's Exhibit 8 for identification?

A. This is an order determining the maximum rent on Apartment 18, 6 West Babcock Street, Bozeman, Montana.

Q. Whose signature appears there?

(Testimony of Louis G. DeNayer.)

A. H. C. Harlen.

Q. Do you know whether that is his signature?

A. That is Mr. Harlen's signature.

Q. Do you know whether any changes have been made?

A. No, no changes have been made.

The Court: Do you offer the exhibit in evidence?

Mr. Knowlton: We offer it in evidence.

Mr. Bunker: That is objected to upon the grounds and for the reason it isn't the original registration and that it is [57] not the best evidence. It is self-serving. There is no foundation laid for filing that paper in place of the original registration.

The Court: This is the original order issued by the Director?

The Witness: That is the order.

The Court: Overruled.

(Plaintiff's Exhibit 8, being order fixing rent on Apartment 18, 6 W. Babcock St., Bozeman, Montana, here received in evidence, will be certified to the Court of Appeals by the Clerk of the District Court.)

Q. (By Mr. Knowlton): Showing you Plaintiff's Exhibit 9, will you state what that is, if you know?

A. This is an order adjusting the maximum rent; it is a modified order adjusting the maximum rent on 6 West Babcock Street, Apartment 20.

Q. Who issued it? A. I issued it.

(Testimony of Louis G. DeNayer.)

Q. When? A. On June 26, 1947.

Q. You would be reasonably certain it was your signature on it, then? A. Yes, sir.

Q. Have you ever changed such rental?

A. From this order?

Q. Yes? A. No, sir. [58]

The Court: Do you offer the exhibit?

Mr. Knowlton: I offer Plaintiff's Exhibit No. 9 for identification.

Mr. Bunker: No objection.

The Court: Very well, it is admitted without objection.

(Plaintiff's Exhibit 9, being order adjusting maximum rent on Apartment 20, 6 W. Babcock St., Bozeman, Montana, here received in evidence, will be certified to the Court of Appeals by the Clerk of the District Court.)

The Court: Court will stand in recess until ten minutes after four.

(Recess.)

The Court: Gentlemen, in connection with Cause 373—that is the one we are trying now, isn't it?

Mr. Bunker: Yes, sir.

The Court: The Court will continue the further hearing of that case until two o'clock tomorrow afternoon. Counsel for both sides have been called by the Court into consultation in the matter in an effort to limit the issues of the case. It seems to the Court there has been, unnecessarily, a lot of the proof and a lot of the records going in, piling up a

(Testimony of Louis G. DeNayer.)

record, which will make it monetarily impossible to prosecute an appeal in case such an appeal is ever desired. It seems to me that the parties can get together on certain basic facts and submit the facts to the Court upon agreement, and the Court [59] can then try any particular issues that remain, and the trial will then be limited so we can understand and follow more easily and make a better determination. The purpose of a trial of this nature is to approximate justice, and so the parties are advised that it is their duty to get together and submit to the Court facts upon which the Court can exercise its conscience here properly, and counsel are urged to so advise their clients to get together to the point where the time of the Court and the time of everyone involved can be lessened to an appreciable extent. It will be necessary for counsel to, of course, consult with their primary witnesses and with the Rent Director, and counsel for the defendant with their client and others, and so the matter will be continued until two o'clock tomorrow afternoon. In the meantime, the Court will be available at your convenience to consult with you and further advise you on the matter, but at this time, the proceedings in this cause are adjourned and in recess until two o'clock tomorrow afternoon.

(Whereupon, the trial of this cause was recessed until 2:00 o'clock p.m., the following day, September 27, 1949, at which time the following proceedings were had:)

The Court: Very well, are we ready to proceed in 373?

STIPULATION AS TO CERTAIN
ISSUES OF THE CASE

Mr. Knowlton: Counsel have arrived at a stipulation as to some of the facts in connection with this case. I should like to read the stipulation in the record: It is stipulated [60] and agreed between the parties hereto, by their attorneys, that the maximum rent applicable to apartment 21 within the Crenshaw Apartments during the time involved in the complaint before the Court was \$50 per month. It is further agreed and stipulated that the records of the Bozeman Defense Rental Area office will show Apartment 20 was rented on the maximum rent date at \$35 per month, unfurnished; that on the 4th day of January, 1947, the Rent Director made an order finding that the rent first charged furnished was \$75; that on June 26, 1947, the Rent Director made an order reducing the rent from \$75 to \$50 per month furnished. A copy of this last order has already been introduced into the files and records of this case as Plaintiff's Exhibit No. 9.

It is further agreed that Mr. DeNayer, as Rent Director for the Bozeman Defense Rental Area under the office of Price Administration and under Mr. Tighe E. Wood, Housing Expediter, has had custody of the records of the Bozeman Defense Rental Area, and that there appears in such rec-

ords an original of an order relative to Apartment 24 in the Crenshaw Apartments, stating the maximum rent was established at \$50 per month, unfurnished; that such order further set and fixed the rent at \$65 per month furnished. This order was issued February 10, 1947.

Mr. DeNayer will further testify that there appears in the records an original of the order relative to Apartment No. [61] 36 in the Crenshaw Apartments stating that the maximum rent was established at \$30 unfurnished, and that such order further set and fixed the rent at \$40 per month, furnished. This order was issued February 20, 1947.

Those records would further show that there appears in such record an original of order relative to Apartment 37 in the Crenshaw Apartments stating the maximum rent was established at \$35 per month, unfurnished. Such order further set and fixed the rent at \$40 per month, furnished. This order was issued February 20, 1947.

It is further agreed and stipulated that there appears in the records of the Bozeman office original order relative to Apartment 48 in the Crenshaw Apartments stating that the maximum rent applicable to such apartment was set at \$15 per month furnished by such order and that such order was issued on January 6, 1947.

It is further stipulated and agreed between the parties that no orders affecting such maximum rentals were ever thereafter made by the Rent Director.

That it further appears in each of these orders referred to by this stipulation and on the face of such orders that copies thereof were deposited in the United States mail on or about the date they were issued.

It is further stipulated that the accommodations here involved, located at 6 West Babcock Street in the City of Bozeman, [62] Montana, is within the Bozeman Defense Rental area, and as such is subject to the rules and regulations of the Housing and Rent Act and Rules and regulations issued thereunder. That is the stipulation we agreed to, is that correct, Mr. Bunker?

Mr. Bunker: That is correct.

LOUIS G. DeNAYER

resumed the witness stand.

Direct Examination
(Continued)

By Mr. Knowlton:

Q. Now, relative to the orders you certified here in Court yesterday, can you state whether or not any administrative appeal was taken from such orders?

A. No, there was no administrative appeal taken from those orders or from any orders issued on the Crenshaw Apartments.

Q. Mr. DeNayer, is there any petitions relative to the changing or raising of rents on these apartments on file now in the office at Bozeman?

(Testimony of Louis G. DeNayer.)

A. Yes, there are.

Q. Approximately when were they made, sir?

A. Within the last two weeks.

Q. Now, prior to this instance in which petitions were filed in your office in the last two weeks, had Mr. Crenshaw, prior to the time of this last instance filed any petition for change in rents?

A. Yes, he did file some petitions. [63]

Q. Do you recall when such petitions were filed?

A. They were processed approximately in June of 1946.

Q. Between 1946 and the last two weeks, have any petitions relative to the Crenshaw Apartments been filed?

A. No, no others have been filed.

Q. Yesterday you testified you yourself issued an order in June, 1947, is that not correct?

A. That is correct.

Q. Do you know whether this order was mailed to Mr. Crenshaw, or not?

A. Yes, it was mailed.

Q. What was your usual procedure for such mailing?

A. Well, we just put them in the regular mail, usually, unless there is something that we want to be sure is delivered. That is the usual procedure.

Q. In other words, your regulations that you operate under require you to deposit copies of orders in the mail, is that correct?

A. That is correct.

Q. In the regular mail is your usual procedure?

(Testimony of Louis G. DeNayer.)

A. Regular mail is our usual procedure.

Q. How was the order you sent to Mr. Crenshaw in 1947 sent?

A. I registered those orders.

Q. Why did you send it by registered mail?

A. I sent out a proposal of what I was going to do and I [64] didn't get any reply, so I wanted to be sure they were delivered.

Q. To whom do you ordinarily and usually send copies of orders you make?

A. To the landlords and the tenants.

Q. Showing you Plaintiff's Exhibit 10 for identification, will you state what that is, if you know?

A. It is a registered letter from the office in Bozeman addressed to B. M. Crenshaw, 6 West Babcock Street, Bozeman, Montana.

Q. How do you happen to have such instrument?

A. It was returned to our office as unclaimed.

Q. Does the letter indicate when it was mailed by post mark or otherwise?

A. June 26, 1947.

Q. What did such letter contain?

A. It contained the orders referred to that were made out on June 27, 1947.

Q. Where has that instrument been since June 26, 1947?

A. It has been in the files in the Bozeman office.

Mr. Bunker: It is objected to upon the grounds (interrupted).

(Testimony of Louis G. DeNayer.)

Mr. Knowlton: I didn't offer it yet. At this time I should like to offer Plaintiff's Exhibit 10 in evidence.

The Court: Any objections? [65]

Mr. Bunker: Objected to upon the ground and for the reason that the Exhibit doesn't show any attempted delivery beyond the unclaimed statement, a statement, of unclaimed by checking the face of that. It doesn't show it was ever attempted to be delivered to Mr. Crenshaw.

The Court: This was registered and deposited in the mail?

The Witness: Yes.

The Court: And returned to you by the mail?

The Witness: Yes.

The Court: Objection is overruled.

(Plaintiff's Exhibit 10, being envelope and contents, addressed to B. M. Crenshaw, 6 West Babcock, Bozeman, Montana, and bearing Registered No. 6294, here received in evidence, will be certified to the Court of Appeals by the Clerk of the District Court.)

Mr. Knowlton: You may inquire, Mr. Bunker.

Cross-Examination

By Mr. Bunker:

Q. On the petition filed by Mr. Crenshaw shortly after the original registration which you testified to, it was requested that certain apartments be changed to certain rents, is that correct?

(Testimony of Louis G. DeNayer.)

A. That is true.

Q. And all of them, without exception, were refused? A. I believe that is true. [66]

Q. That's right, and thereafter, at various times, upon your own motion, or the motion of your local area Rent Director, there were various changes made in rentals, is that correct?

The Court: I didn't hear the question, Mr. Bunker.

Q. Thereafter, at intervals, and either by yourself, or by the area Rent Director located in Bozeman, there were various changes in rents of the different apartments made, is that correct?

A. By order you mean?

Q. Yes.

A. No, there was no changes made.

Q. Isn't it a fact that without petition or order or anything else, Apartment 14 was changed from \$35 to \$45?

A. I would have to look at the record to see that. We had about 4,000 of them, so I would have to see it.

Q. Isn't it a fact—just take it generally—that you changed all of them from around \$35 to \$65, \$75 and \$40, isn't that a fact?

A. All over the town, you mean?

Q. Right in that building.

A. You mean on your petition?

Q. No, on your own initiative.

A. On the Director's initiative, that is true.

(Testimony of Louis G. DeNayer.)

Q. You made a number of changes? [67]

A. Yes, but not on petition.

Q. Did you ever send any notices on those?

A. Yes, we have sent notices.

Q. You sent notices out? A. Yes.

Q. Were they delivered?

A. I wouldn't have any way of knowing.

Q. Isn't it a fact that certain ones of those apartments went up as high as \$75?

A. On our orders, you mean?

Q. Yes.

A. I think so, yes, I believe there was one.

Q. Number 20, Apartment Number 20?

A. I would have to look at the record to be sure of that.

Q. That is in the evidence. It has been stipulated to that effect. Now, do you know those apartments, do you know what they are like?

A. I was in them once.

Q. Isn't it a fact that practically all apartments, with the exception of the five-room apartments, are exactly alike?

A. I didn't go through all of them.

Q. Don't you know that from your investigators?

A. From the record, it would indicate they are about the same size.

Q. And the same accommodations? [68]

A. That's right.

Q. So that you had variously changed them

(Testimony of Louis G. DeNayer.)

from anywhere from \$40 to \$75 per month per apartment without reason?

Mr. Knowlton: I should like to object to that question. Mr. DeNayer has testified this defendant has made no administrative appeal from any of these orders. Mr. Crenshaw, if he is aggrieved by those orders, has the right of administrative appeal. As a matter of fact, all the orders were issued under the Emergency Price Control Act. Under that Act, he had a procedure for appealing. The Emergency Price Control Act gave exclusive jurisdiction to the emergency court of appeals to hear such matters. The questions now being directed to this man go to the wisdom of these orders. He is in the wrong place now to question these orders.

The Court: What is your position, Mr. Bunker. That is the way I view it, as stated by counsel. It seems to me we are not trying here the right or wrong of the order. The order has been made.

Mr. Bunker: I am not going to that point, your Honor. My point is this, and it will be this during the whole trial: That the Office of Price Administration, as operated in Bozeman, Montana, was a vicious attack on Mr. Crenshaw, and that these various rentals without notice are such as to mislead Mr. Crenshaw. They are all identical apartments.

The Court: First, you have two different propositions there, [69] Mr. Bunker. Your intimation

(Testimony of Louis G. DeNayer.)

that the Office of Price Administration in Bozeman was a vicious attempt to harass the defendant has no place in this action that I can see. In other words, the only way that they could harass him would be by issuing orders arbitrarily. Your place for attacking arbitrary orders is provided in the Act for appeal, administrative appeal. Is that not so?

Mr. Bunker: No, your Honor. The answer to that is this: In the \$65 rate, when Mr. Crenshaw went to this man and said, "You can't have this," he produced an order showing that he was permitted to have it at \$65. That was one of the poorer average apartments, and upon that, Mr. Crenshaw depended that he was permitted to charge the same for the other apartments of a like character, and proceeded on that theory.

The Court: Well, of course, he may have felt that way, and you can introduce testimony to the effect that he did receive an order authorizing him to charge \$65 for one apartment, but that doesn't, that has no bearing as to whether or not the office of the rent control was a vicious administration designed to harass the defendant.

Mr. Bunker: It would be in this, your Honor: Not that they reduced the rent, but that they reduced it after having raised it and it came to his knowledge.

The Court: The office of rent control, like every other [70] office, made, no doubt, many mistakes,

(Testimony of Louis G. DeNayer.)

did a lot of things that were wrong, and among those wrongs, it may have been they raised rents too high, they set maximum rents that were too high or too low, and may have, in one apartment, set rent too high or too low, and they may have made a half a dozen changes, and the rent that is now on that apartment may be, as far as you and I are concerned, wrong, but the fact reminds, they made an order, and they were authorized to make that order. If the order was wrong, if it wasn't justified, doesn't the Act provide for a method of attacking that?

Mr. Bunker: It does, but unless he had notice, he couldn't attack it.

The Court: Your only problem then, the only thing you are interested in, is whether or not he had notice?

Mr. Bunker: That is correct.

The Court: That has nothing to do with the viciousness of the administration.

Mr. Bunker: We want to find out from Mr. DeNayer, if he can tell us, why these apartments were placed in different categories without reason.

The Court: I have stated to you once that it doesn't make any difference.

Mr. Bunker: If he has notice of one at \$65 (interrupted).

The Court: That may or may not have been right, and the administrator could change that, couldn't he? [71]

(Testimony of Louis G. DeNayer.)

Mr. Bunker: But, he didn't change that one.

The Court: But it doesn't mean he couldn't change it at any subsequent time.

Mr. Bunker: I presume.

The Court: Of course, he is supposed to, under the Act, he is supposed to act with discretion. He is not supposed to act arbitrarily, but the place to attack that is not here, is it?

Mr. Bunker: I think it is when he bases his act on an order they issued. The question arises under that law that was in in 1947. That was supposed to be administered fairly and impartially, both as to tenant and landlord. We are showing it wasn't.

The Court: If the landlord felt the rental fixed by the Rent Director was not fair, didn't the Act provide for a method of attacking it?

Mr. Bunker: Yes, if he knew.

The Court: Well, if he knew, then he had a method to attack it. If he didn't know, then, he is not bound by it, I suppose.

Mr. Bunker: That's right.

The Court: Why bother going into it?

Mr. Bunker: He does know there are apartments renting at \$65. He has, therefore, the right to believe that the rest of them are \$65. [72]

Mr. Knowlton: The question was an attack on the validity of the order, and I objected to his question in which he purported to attack the order.

The Court: The Court will sustain the objection.

(Testimony of Louis G. DeNayer.)

Q. Will you tell us, Mr. DeNayer, why various apartments run from \$40 to \$65 at the present time? A. That is based on the order.

Q. I am asking as to your discretion. Why, in your discretion, you did make those various apartments different?

A. We usually made changes like that on comparability.

Q. Very well, then, did you know whether apartments 14, 37, 9, 1, 4 and 12 are exactly alike?

A. I can tell by looking at the records so far as the rooms are concerned.

Q. Would you do that, Mr. DeNayer?

A. Do you want me to look at the records?

Mr. Knowlton: Which others (handing files to witness)?

Mr. Bunker: I would like 20 and 12 in there.

A. No. 24 and 9 are registered as 4-room apartments, furnished, with the heat or heating fuel furnished and cold and hot water furnished. Those two are the same. Numbers 12, 14 and 20 are registered as 4-room apartments, unfurnished, with the same services. Number 37 is registered as two rooms, furnished, with everything furnished with the exception of the garage. [73]

Q. And would you give us number 20?

A. Number 20 is four rooms, unfurnished. I gave you that.

Q. And these apartments, many of them, were later changed because they were furnished.

(Testimony of Louis G. DeNayer.)

A. I don't know. I had very little cooperation from you or Mr. Crenshaw letting us know about anything or petitioning.

Q. As a matter of fact, the petitions showed many of these apartments were furnished. The registration was as of 1945. In 1946 the petitions showed that they were furnished, isn't that right?

A. Number 12, were you referring to?

Q. That is one of them.

Mr. Knowlton: I think Mr. Bunker is referring to the petitions Mr. Crenshaw made immediately after the registrations.

A. Our investigator found that they had not been furnished at the time those petitions were filed, but were still being rented unfurnished, with merely a statement that it was going to be the policy to change to furnished after the tenant had left and before it would be rented to a new tenant.

Q. As a matter of fact, don't those books show that nearly half of them had been furnished since 1945, since March 1st, I think, the registration?

A. March 1, 1946, you mean?

Q. No, I mean the maximum rent date? [74]

A. No. In our investigations, our inspector went over there and made several investigations until Mr. Crenshaw threw him out, and then we didn't go back any more, but if we wanted to know something, we would contact the tenants by telephone. You advised me yourself not to go over there, Mr. Bunker.

(Testimony of Louis G. DeNayer.)

The Court: You mean not to go over there to make inspections?

The Witness: That's right, that I might get hurt.

The Court: Do you mean to tell me that counsel for the defendant here advised you not to go to the apartments because you might get hurt in the performance of your official duties?

The Witness: That is true.

The Court: This is an awful case to me, proceed.

Mr. Bunker: That was for his own good, your Honor.

The Court: Yes, it is going to be for somebody's good. The Court's not going to stand for that sort of thing to be done. If an officer of the government cannot perform his duty, the Court will find out about it.

Q. You haven't answered my question, Mr. DeNayer.

A. What was your question, Mr. Bunker?

Q. I am asking it again. Why is there a variance of from \$40 to \$75?

A. That is the rent charged on the maximum rent date. On July 1, 1945, on Apartment 12, the maximum rent charged was \$50; on Apartment 14, on the maximum rent date, the rent charged was \$35; on Apartment 20, \$35; on Apartment 24, on the maximum rent date, \$50; on Apartment 9, \$35; on Apartment 37 on the maximum rent date as registered, it was \$45. Those were the rents that could be collected.

(Testimony of Louis G. DeNayer.)

Q. Then, later you made orders raising 14 to \$45, is that correct? A. That is true.

Q. And you raised \$37 to \$50?

A. That is true. I better check these before I say that is true, but you know that, that is in the stipulation, isn't that right?

Q. Yes, it comes from the stipulation. To \$50, is that correct? A. All right.

Q. No. 1 was raised to \$50, isn't that right? According to the stipulation you raised No. 20 to \$75, and then later reduced it to \$50 or \$55?

A. Yes, it was too high.

Q. Is that true?

A. That is true, it was too high.

Q. And you raised 12 to \$65, isn't that right?

A. Isn't that the stipulation?

Q. That is the stipulation? A. Yes.

Q. Do you know whether there is any difference in those apartments or not? [76]

A. I wouldn't know unless I would go and look at them.

Q. Your investigators, however, did see them in the first instance?

A. In the first instance he looked at some of them. Then, there was supposed to have been a baseball bat that he was going to get in the head.

Q. I think you misstated to the Court what hap-

(Testimony of Louis G. DeNayer.)

pened. Your investigators didn't come in to see what the apartments were when they were thrown out. They came in bothering and annoying tenants who didn't want to see them.

A. There wasn't a tenant ever told our investigators they were bothering them.

Q. We will make proof of that, Mr. DeNayer.

The Court: Counsel will not argue with the witness. You can question him, but your statements are not evidence at this point. You can take the stand if you are so advised.

Q. At the time I told you you would do well to stay away from the Crenshaw premises, I told you for the purposes and in the manner it was being done, you had better stay away?

A. You told me I was taking a chance of being killed if I went over there, or attacked.

Q. And I told you why, didn't I, at that time?

A. You probably gave me a reason. I don't recall what it was, but all I know, you told me if I went over there, I might be killed. [77]

Q. I told you you would be thrown out.

A. Or attacked. You made it stronger than that.

Q. From your investigation of the registrations, isn't it a fact that the differences between these various apartments are nothing; except as to 1 and 24, which are larger apartments, they are all exactly alike, except 1 and 24, except 37?

A. They are all registered as four rooms, with the exception of 37.

(Testimony of Louis G. DeNayer.)

Q. And they are all practically identical?

A. Sir?

Q. They are all practically identical, except 1, 24 and 37, with the exception of being registered as being furnished or unfurnished, so far as the registration is concerned? A. Yes.

Q. Yes, then I am asking if you have any reason to give us at all why furnished 20 went up to \$75, 12 went up to \$65 and 24 went up to \$65?

A. As a reason? I wouldn't know unless I would look at the complete docket. It was probably on comparability that we adjusted it.

Q. If they are identical, would it be on comparability?

A. Sometimes it would. In the case of the 1946 law, we were not allowed to increase rents to equalize them in a building. There were certain reasons that we could raise the [78] rent for, but that was not one of them at that time. Now, it is true that we can do that under the present rent Act.

Q. Then, your raises would not be on the basis of comparability?

A. Some of them might be if they were lower than comparable rents in other apartment houses.

The Court: Mr. Bunker, do you intend to go into all the facts and circumstances that went into the determination of the order of the Rent Director as to each apartment?

Mr. Bunker: I am trying to give him an opportunity of showing the basis for these changes.

(Testimony of Louis G. DeNayer.)

Mr. Knowlton: My objection was sustained made to that line of questioning.

The Court: I don't see what the point is of going into what was behind the order in each particular case, because the Act itself set up an administrative method for the landlord to attack that order. If the rent of \$65 on Apartment 24 was too low, the landlord could attack that order.

Mr. Bunker: Surely.

The Court: And if it was too high, he would let it go, I suppose, so why bother going into it.

Mr. Bunker: For the reason that the 1941 law, or the 1946 law and the 1949 law all are based upon the premises that this Act is for the protection of both landlord and tenant. The landlord here hasn't been given that protection, and I am [79] trying to find out why.

The Court: You are not going to try in this case the validity of each particular order.

Mr. Bunker: I am trying to get at the comparability of these orders and see why they are not comparable.

The Court: What difference does it make? If the Rent Director was wrong in making the order, does that change the fact there was an order?

Mr. Bunker: No.

The Court: Does that change the fact the landlord was bound by the order?

Mr. Bunker: It goes to the good faith of the landlord.

(Testimony of Louis G. DeNayer.)

The Court: The good faith in not obeying the order?

Mr. Bunker: No, in doing what he believed to be correct.

The Court: Of course, he may have good faith. He may have thought the law was unconstitutional and he didn't have to obey it.

Mr. Bunker: He was misled, your Honor, that is what we are attempting to show.

The Court: Do you have any authority to present to the Court for my consideration of this proposition of yours in this case?

Mr. Peterson: May it please the Court, may I suggest to the Court that besides the technical feature of this case, or the overcharge based upon an order, that the plaintiff has come in here and asked for certain equitable relief, and that [80] the injunctive relief asks for this Court to fix the rents at a certain price. Now, on the theory, on the principle——(interrupted)

The Court: The Court isn't asked to fix the rents, is it?

Mr. Peterson: The plaintiff is asking for an injunction in here. And on the principle that he who seeks equity must do equity, we felt before the Court should grant injunctive relief in saying the rent must be so and so, that we have a right to show the comparable features of the case. In other words, if there are equities here, we feel that the Court should understand them.

(Testimony of Louis G. DeNayer.)

The Court: Of course, I can understand that the Rent Director may have made orders which don't bear up under scrutiny as to comparability, but that doesn't change the fact there was an order, and that the landlord was bound by the order at that time until the order was changed, and he had an opportunity to change it. Now, is it contended that he was denied that opportunity?

Mr. Bunker: Yes, your Honor, it is, in that he never received notices of any changes, except once for one \$65 and one \$75 from the tenants, and not from the Office of Price Administration.

The Court: It is just a question of notice. Limit it to that. Limit it to his failure to get notice. I don't know whether it is necessary or not under the Act. [81]

Mr. Bunker: It is my opinion it is.

The Court: Do you have a copy of the Act? What does the Act say, Mr. Knowlton, with reference to the requirement of giving notice?

Mr. Knowlton: The requirement is that notice be given, that notice be mailed to the landlords and the tenants. In any event, notices have been given, Mr. DeNayer has testified. As a matter of fact, that is controlled by procedural regulation providing how the Rent Director shall act.

The Court: The landlord must be notified, and the Rent Director is by regulation required to mail him a notice. Now, if the Rent Director didn't mail him a notice, go into that matter. Why go

(Testimony of Louis G. DeNayer.)

into the question as to how he happened to make the determination with to Apartment A or with reference to Apartment B. If he made the determination, the question is dead. The question is, did he notify the defendant?

Mr. Bunker: The defendant has received through the tenants and not otherwise, two notices, one for \$75 and one for \$65. Those notices he had notice of. He had no notice of any others. I am trying to find out why, if he received those through tenants, and there were other orders made, they weren't the same.

The Court: It doesn't make any difference whether they were the same or not. The Court is ruling on that. Let's proceed from that point.

Q. (By Mr. Bunker): Now, Mr. DeNayer, you stated these notices were mailed out?

A. The notices were mailed out.

Q. By whom?

A. By either the girl in the office or myself.

Q. Do you find any there shown to be mailed out by yourself? I want an order showing you mailed it, any order.

A. These orders were mailed on February 20, 1947, both of them—one of them by Betty Walton, who was Clerk at the time, and one of them 6/26/47 by the same girl in the office.

Q. In other words, you are testifying they were mailed because someone else's initials were on them, is that right? You were not present?

(Testimony of Louis G. DeNayer.)

A. That is what the order shows.

Q. You were not present?

A. I didn't drop them in the mail box, which is not required.

Q. You didn't supervise the mailing?

A. No.

Q. Nor of any of them? A. What?

Q. You didn't supervise the mailing of any of them? A. No.

Q. So your statement is pure hearsay, isn't that correct, what someone else has told you? [83]

A. No, it is on the order. It was deposited in the United States Mail by a certain person who initials the order.

Q. That is what somebody else said, Mr. DeNayer? A. That is what is on the order.

Q. Now, there were petitions filed, some about two weeks ago, or 10 days ago, something of that nature?

A. He filed petitions approximately two weeks ago, a little over, probably.

Q. They were filed right after our conference in Missoula? A. Shortly after that.

Q. Upon an agreement among us as to what we felt (interrupted).

The Court: What is the purpose of this testimony?

Mr. Bunker: He brought it out, your Honor, on direct examination.

The Court: What is the purpose of it, what do you want to inquire about?

(Testimony of Louis G. DeNayer.)

Mr. Bunker: To show we were in agreement, defendant's and plaintiff's attorney and the administrator, as to what the actual value of these rooms is.

The Court: Overruled. You will refrain from going into any further questioning along that line.

Mr. Bunker: That is all.

Mr. Knowlton: I have no questions. I should like to ask the Court at this time if I can't dismiss Mr. DeNayer from [84] further attendance in this cause.

The Court: It doesn't appear to me there is any necessity for him to be here further.

Mr. Knowlton: He will be here tonight until 10:30, but he wants very much to catch a plane.

The Court: Does the stipulation you entered into with reference to the various orders that were made, does that stipulation have any reference to what the record shows with reference to them having been mailed at the time.

Mr. Knowlton: The stipulation was to the effect that on the fact of the orders mentioned in such stipulation, it shows those orders were mailed to the defendant and deposited in the United States Mail.

The Court: Very well, Court has no reason to hold Mr. DeNayer then.

(Witness excused.)

(Five-minute recess.)

B. M. CRENSHAW

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Knowlton:

Q. State your name, please?

A. B. M. Crenshaw.

Q. You are the defendant in this case? [85]

A. Yes, sir.

Q. Where do you reside, sir?

A. 6 West Babcock.

Q. That is in Bozeman? A. Yes.

Q. How long have you resided there?

A. Since 1937, December 10, 1937.

Q. You have lived there since?

A. Yes, sir.

Q. Do you recall about last September 7th, last year, 1948, answering certain requests for admissions propounded to you by the plaintiff?

A. How is that?

Q. Do you recall answering certain requests for admissions on the 7th of September, 1948?

A. Admissions?

Mr. Knowlton: If your Honor please, if I may have the answers to the requests for admissions.

Q. These are the amended reply to requests for admissions which your attorney filed in your behalf, and which you swore to. Is that not correct?

A. That is my signature.

(Testimony of B. M. Crenshaw.)

Q. Now, you have that copy before you?

A. Yes, sir.

Q. Will you turn to page 2 of such reply. Your answer to [86] Request No. 6 is on that page. In your answer, you admit that Mrs. John Durham occupied Apartment 1 from September 1, 1947, to June 1, 1948. Then, you deny that such tenant paid the sum of \$100 a month rent from September 1, 1947, to March 1, 1948, and you also deny said tenant paid \$85 a month rent from March 1 to June 1, 1948.

A. I give him extra service.

Q. That is what you state there, that you denied collecting that as rent. You admit he was there during the period, but you deny collecting that rent, is that right? What rent did you collect from him?

A. I put in an extra bed for his boy, and he paid every two weeks. He wanted it by the week. He was looking for a house. He wanted it by the week, so I rented it to him for \$50 for every two weeks.

Q. Then, did you take \$50 every month during that time? A. \$50 every two weeks.

Mr. Bunker: This is objected to as not proper direct examination. If he has called this witness as he has, it is direct examination, and he has now started in on cross-examination, and it is improper direct examination. It is argumentative and it is improper examination.

(Testimony of B. M. Crenshaw.)

The Court: Overruled.

Q. I am just trying to get straightened out, Mr. Crenshaw. Did you collect during the entire period \$50 a week from him? [87] A. No.

Q. You collected \$50 when he first went in there? A. \$50 every two weeks.

Q. But you collected that \$50 every two weeks during the entire period you said he was in there?

A. Not the entire period.

Q. When did you quit?

A. I don't know. After he was in there about so long, he was slower finding a house than he thought. I reduced it to \$85. It is a two-bedroom apartment. I reduced it to \$85.

Q. You originally collected \$50 every two weeks. Did you ever reduce it to \$85 a month?

A. All his receipts is \$42.50 every two weeks. Then, when he found a house, he wouldn't have only \$42.50 to pay.

Q. You collected that for the balance of his term, is that correct? A. Yes, sir.

The Court: Before you leave—are you leaving this item now, counsel?

Mr. Knowlton: Yes, is there some further question the Court would like?

The Court: You collected \$50 every two weeks from Mrs. Durham from September 1, 1947, until when?

The Witness: I wouldn't know, your Honor, just exactly when. He should show it there. [88]

The Court: When you made your denial, you

(Testimony of B. M. Crenshaw.)

were just denying that you collected money by the month, is that it?

The Witness: That is correct.

The Court: It was just based upon the month part, and not that you didn't collect the money?

The Witness: He wanted it, your Honor, every two weeks. If he found a house, he could move and not have to pay a month's rent.

The Court: So your denial here, when you say you deny that the tenant paid \$100 a month, you just mean he didn't pay you by the month?

The Witness: Yes, sir.

The Court: You don't mean he didn't pay you \$100 every month?

The Witness: You can figure it any way you want.

The Court: He did pay you \$50 every two weeks, which is more than \$100 a month?

The Witness: Yes, sir, he wanted (interrupted).

The Court: Very well, that is all, proceed to the next item.

Q. (By Mr. Knowlton): If you will read your request 9 found on page 2 of that instrument you have before you?

A. I can't see it very good.

Q. You admit that Victor B. Barkley occupied Apartment 8 from April 8th to June 1, 1948, and deny that during each and every month of said period, said tenant paid \$75 a month as rental. In other words, you admit he was there from April

(Testimony of B. M. Crenshaw.)

8th to June [89] 1st, but deny that you collected \$75 a month. What did you collect?

A. I would have to figure it up; he owes me \$100.

Q. Why does he owe you?

A. He left without paying his rent.

Q. How long was he there?

A. I wouldn't know.

Q. Did you collect \$75 while he was there?

A. Yes.

The Court: You collected \$75 a month while he was there?

The Witness: Yes, sir, I gave him extra service he wanted.

Q. Why did you deny in your answer to the requests for admissions that you collected \$75 a month?

Mr. Bunker: Just a minute, your Honor. He was asked if he collected as rent—the question asked under Number 9 was \$75 a month for the use and occupancy of Apartment 8. He wasn't asked if he collected \$75 a month. That is what he is trying right now to say. Let him say so.

Q. He paid \$75 during the period, you admit that. What did you get the \$75 for?

A. For extra service I gave him. I put in an extra bed.

Q. Did you ever apply to the Rent Office to allow you to increase the rent for extra service?

A. No, sir.

(Testimony of B. M. Crenshaw.)

The Court: He did pay \$75 a month as rent for the apartment? [90]

The Witness: He owes me \$100 yet, your Honor.

The Court: You charged him \$75 a month for the apartment?

The Witness: Yes, with extra service.

The Court: I don't see why we want to quibble about these things. The Court is here to do justice. Let's not quibble about it, let's get down to business and tell the truth right from the star. You will get along better that way.

Q. (By Mr. Knowlton): I will read you your answer to Number 5. You admit that Mrs. J. M. Ashmore occupied Apartment 8 from March 6, 1948, to June 1, 1948. You deny you charged her \$75 per month as rental.

The Witness: Your Honor, she wasn't in Apartment 8.

The Court: Well, you say she was. You say she was in your answer. You have read that, haven't you?

Mr. Knowlton: As a matter of fact, she was not. The request asked him to admit that she was in 9. I think it is a typographical error on defendant's part.

The Court: Did she occupy Apartment 9?

The Witness: Yes, sir.

Q. She occupied Apartment 9 between those periods of time, isn't that you meant to say?

A. I wouldn't know the period of time.

Q. You admit, you already said during that

(Testimony of B. M. Crenshaw.)

period of time, Victor B. Barkley occupied that apartment? A. I didn't read that. [91]

The Court: He has admitted she occupied apartment 9 instead of 8——

The Witness: And 37 part of the time.

The Court: ——from March 6, 1948, to June 1, 1948.

The Witness: And 37 part of the time. I don't want to leave a thing out, I want everything in there.

Q. (By Mr. Knowlton): You deny, however, you charged her \$75 per month as rental for Apartment 9. What I would like to know is how much you did charge her as rent?

A. She had a little boy. I had to put a baby crib in there.

Q. Did you charge her \$75 a month?

A. For use of the apartment and extra service.

Q. Did you apply to the rent office for an increase by reason of putting in such service?

A. No, sir.

Q. In your answer to Request Number 18, you state as follows, I will read it to you: Admits that Mr. and Mrs. M. C. Davies occupied Apartment 12, Crenshaw Apartments, from June 1, 1947, to June 1, 1948, and you deny that each and every month said tenants paid the sum of \$75 as rent for said Apartment 12. What I would like to know is during that period, how much rent did you collect from Mr. and Mrs. Davies?

(Testimony of B. M. Crenshaw.)

A. I wouldn't know. I put in a bed there for their daughter. That was extra service.

Q. I understand, but what did you charge them?

A. \$75.00.

Q. Now, Mr. Crenshaw, in answer to Request Number 3, which is found on page 2, you admit that Major L. W. Konecki was a tenant in Apartment 14 from November 1, 1947, to June 1, 1948, and you deny you charged said tenant \$75 per month for each and every month during that period. What did you charge him during that period?

A. For the taking out the furniture that was in there and putting his in, and the rent was \$75.

The Court: Which item was that?

Mr. Knowlton: It is Apartment 14, Item 3, page 2 of Mr. Crenshaw's answers to the requests.

The Court: Did you collect \$75 per month from the tenant in Apartment 14 between the months, between November 1, 1947, and June 1, 1948, did you collect \$75 a month?

The Witness: For the apartment and storage of my furniture that I took out and he replaced it with his.

Q. (By Mr. Knowlton): Did you ever apply to the Rent Office for an increase by reason of such extra service?

A. I didn't know you had to.

Q. In connection with Request Number 13, and the answer thereto, which is found on page 3 of the answers, you admit in answer to that request that Mr. and Mrs. John Vallee occupied Apart-

(Testimony of B. M. Crenshaw.)

ment 16 from August 20, 1947, to June 1, 1948. However, you deny that for each and every month of said period [93] the said tenants paid the sum of \$75 per month except in the month of March, 1948. You admitted you collected the sum of \$55 for the month of March. I will ask you about those months except the month of March. How much did you collect from Mr. and Mrs. Vallee?

A. I wouldn't know.

Q. You don't remember?

A. No, I put in a bed for the little girl if they paid \$55 for the first month.

Q. You admit they paid \$55 for the month of March, which was right in the middle of the term.

A. They lived in 20 and moved to 21 and then to 16.

Q. How much did you collect from them while they were there, except for the Month of March, 1948?

A. With extra service, it was \$75.

Q. What was the extra service?

A. They had a little girl about 8 or 10 years old. I had to put a bed in the bedroom for her.

Q. Did you ever petition the Rent Office for an increase in rent?

A. I didn't know you had to.

The Court: Was the little girl with them when they moved into the apartment?

The Witness: They had a 4-room apartment, and when a 2-bedroom apartment was available, I

(Testimony of B. M. Crenshaw.)

thought so much of them, I [94] let them have a 2-bedroom apartment.

The Court: The extra service was permitting the little girl to live there?

The Witness: The extra service was putting in this bed in the 4-room apartment and the 2-bedroom apartment.

The Court: What were you charging for that apartment without extra service?

The Witness: \$65.

The Court: \$10 for the use of the bed a month?

The Witness: Yes, sir.

Q. (By Mr. Knowlton): In answer to Request Number 8, which is found on Page 2, you have admitted that R. H. Henke occupied Apartment 17 from September 1, 1947, to June 1, 1948. However, you deny that said tenant paid the sum of \$55 per month for the use of such apartment. How much did you collect from Mr. Henke for the use of that apartment?

A. I took out my furniture, and he put his furniture in. I charged him \$55 a month. I had to store my furniture.

The Court: Which item, counsel?

Mr. Knowlton: Answer to Request 8 on page 2, if the Court please, with reference to Apartment 17.

The Court: Very well. What was the extra charge for in this case?

The Witness: Storage. He wanted to use his

(Testimony of B. M. Crenshaw.)

davenport and chairs. I had to take mine out and store them. [95]

The Court: How much was the storage?

The Witness: \$5.

The Court: \$5 a month for the storage of a davenport?

The Witness: And two chairs.

The Court: How many chairs?

The Witness: Two.

The Court: Two chairs and a davenport, \$5 a month?

The Witness: Yes, sir.

Q. (By Mr. Knowlton): Now, in response to Request No. 18—I am sorry, Request No. 15, you admit Mr. and Mrs. E. A. Wilson occupied Apartment 18 in the Crenshaw Apartments from April 15, 1948, to June 1, 1948. You deny they paid \$75 per month for the use and occupancy for said apartment 18. If you didn't collect \$75, what did you collect for that apartment?

A. There was the same thing. She wanted a 5-room dresser drawer in there to put extra clothes in. The \$65 I was supposed to get and \$10 extra would take care of the labor and use of it.

Q. You gave them what?

A. A daveno or something, 5 drawers to put clothes in it. I don't know what you call it, a dresser or something.

Q. In answer to Request Number 10, you state you admit that Joseph D. O'Neill occupied Apartment 20, Crenshaw Apartments, from January 15,

(Testimony of B. M. Crenshaw.)

1948, to June 1, 1948. You deny that said [96] tenant paid the sum of \$75 as rental. If you didn't collect \$75, what did you collect?

A. He had an order there for \$75.

Q. You collected \$75 then? A. Yes, sir.

Q. Why did you deny it?

A. I don't know.

Q. You swore to those answers to the requests for admissions, you know. In response to Request 12, you stated—that is on page 3—that Mr. and Mrs. John Vallee occupied Apartment 21 from some time in November, 1946, to August 20, 1947, and you deny that said tenants paid the sum of \$75 per month as rent for said Apartment 21. If you didn't collect \$75, what did you collect?

A. Some of that charge was for the extra bed.

Q. Did you ever petition to charge for the extra bed to the rent office?

A. I didn't know you had to.

The Court: What was the extra bed for here in this instance?

The Witness: For the little girl, it is the same one. He was in three different apartments, your Honor.

The Court: How many beds in that apartment?

The Witness: One in the bedroom. It was just a one bedroom apartment.

The Court: A one-bedroom apartment? [97]

The Witness: Yes, sir.

The Court: How much did you charge them for extra service, did you say?

(Testimony of B. M. Crenshaw.)

The Witness: \$10 a month.

Q. (By Mr. Knowlton): In respect to Request 14, which is also found on page 3, you have admitted that Mr. and Mrs. R. C. Gregor occupied Apartment 21 from March 5, 1918, to June 1, 1948. You deny during each and every month of said period said tenants paid the sum of \$75 for rent for said Apartment 21. How much rent did they pay for that period?

A. They owe me \$105.

Q. I am asking you if they paid \$75 during those months?

A. No.

Q. How much did they pay?

A. You figure it out.

Q. They may owe you some money. But how much did you collect from them during those months they were there?

The Court: How do you know they owe you \$105?

The Witness: I made a statement out one time. I can't find it. I lost it. They paid \$20 and \$40.

The Court: What were you charging them?

The Witness: \$75 a month.

Q. (By Mr. Knowlton): You collected \$75 per month?

A. Not for the whole time.

Q. Do you remember when the Gregors moved out? [98]

A. No, sir, I don't.

Q. You collected \$75 per month from them for part of the time then?

A. Yes, sir.

Q. Would you say you collected it for the first three months they were there?

(Testimony of B. M. Crenshaw.)

A. I wouldn't know what three months the first three months were.

Q. However, you did collect \$75 for a number of months, didn't you?

A. I collected it partly all the way through. The first payment was \$20, the next one was \$40, the next one was \$35. I really wouldn't know.

Q. This \$150 you claim they owe (interrupted).

A. \$105.

Q. What? A. \$105.

Q. That is for the rent you didn't collect?

A. Yes, sir.

Q. At the rate of \$75 per month?

A. You can rate it any way you want to.

Q. In Answer to Request No. 7, you admit that Leona Reeves, Clarice Reeves and Lois Ketter occupied Apartment 24 from April 1, 1948, to June, 1948, but you deny that said tenants paid the sum of \$75 as rental for the use and occupancy of [99] said Apartment 24. I would like to ask you how much you collected from them if you did not collect \$75?

A. I collected the extra \$10 for the third girl in the apartment.

Q. Did you ever petition the office for an order allowing you to charge extra rental?

A. I never made it.

The Court: The request to admit mentions three girls, does it? What is the request to admit?

Mr. Knowlton: I think it does.

The Court: What did you mean when you de-

(Testimony of B. M. Crenshaw.)

nied you collected \$75 a month rent from Leona Reeves, Clarice Reeves and Lois Ketter for use and occupancy of Apartment 24? What did you mean by denying that?

The Witness: I wouldn't know.

Q. (By Mr. Knowlton): In answer to Request Number 17, you admit that Priscilla Larson occupied Apartment 36 from November 1, 1947, to June 1, 1948. You deny that for each and every month of said period said tenant paid the sum of \$65 a month as rental for said Apartment 36. If you didn't collect \$65 per month, what did you collect?

A. In what, 36?

Q. 36.

A. That was \$55 a month, an there was two of them there.

Q. How much did you collect from them? [100]

A. \$55.

Q. You collected \$55 for two or one?

A. Two.

Q. You didn't collect \$65 for two?

A. No, sir, I never did from 36. There must have been a typographical error there.

Q. In connection with Apartment 37, you admit, in response to my request, that Mrs. J. M. Ashmore occupied 37 from April 6, 1947 to March 6, 1948, and deny that you charged said tenant \$55 per month during said period as rental. This is the same Mrs. Ashmore as in the other apartment, isn't it?

A. Yes.

Q. Now, when Mrs. Ashmore was up there in 37,

(Testimony of B. M. Crenshaw.)

if you didn't collect \$55 per month, what did you collect?

A. I must have collected about half of it. She owes me \$385 now.

Q. Mrs. Ashmore does? A. Yes.

The Court: Did you charge her \$55?

The Witness: It was the rate it was supposed to be. Some months she would pay half and some months she wouldn't pay half, and then she moved.

The Court: Then, you were wrong when you denied you charged her \$55 per month? [101]

The Witness: Yes, sir.

Q. (By Mr. Knowlton): In response to our Request 16, you admitted Mr. and Mrs. Carl Jones occupied 48 from April 10, 1948, to June 1, 1948, and you deny that they paid \$11.25 per week as rent for said Apartment 48. If they didn't pay \$11.25, how much did they pay?

A. That is a new one on me. That is by the week?

Q. By the week. Did they pay \$11.25 by the week? A. Yes, sir.

Q. Why did you deny it then?

A. I must not have read that through. They wanted it by the week, your Honor, it is generally more money by the week than it is by the month.

Q. Mr. Crenshaw, in connection with these apartments generally, isn't it true as a matter of fact that your rents that you registered with the rent office in many cases were lower than the charges you made?

(Testimony of B. M. Crenshaw.)

A. Right on the rock bottom. They were war prices.

Q. You understand the charges you made from these various tenants were larger than those you registered? A. Yes, sir.

Q. Where did you get those charges?

A. I made them myself. Where did you expect me to get them?

Mr. Knowlton: You may examine. [102]

Cross-Examination

By Mr. Bunker:

Q. You say you made them yourself?

A. Yes, sir.

Q. Hadn't you, prior to making the changes to \$65 and \$75, received notices through tenants that those prices were the prices for the like or same apartments? A. Yes, sir.

Q. So, that when you received the notice that Apartment 24 had been set by the Office of Price Administration at \$65, what did that lead you to believe as to apartments of like character?

A. All those 18 are just alike except the three \$55's.

Q. It was your belief the rent was to be \$65 after you received the notice through your tenant?

A. Yes, sir.

Q. As to the one where you received the notice from John D. O'Neill? A. Yes, sir.

Q. That was \$75, wasn't it? A. Yes, sir.

(Testimony of B. M. Crenshaw.)

Q. That was about early in January, 1947, was it not? A. Yes.

Q. And that was for \$75? A. Yes, sir.

Q. And you believed you could make a charge in all like apartments of \$75? A. Yes, sir.

Q. You did charge \$75 for most of them?

A. Yes.

Q. Did you ever receive any notice that any of these apartments had been reduced from what you thought they had been placed at? A. No, sir.

Q. Did you ever receive a notice of this letter which has been testified to here by Mr. DeNayer as having been registered to you in June, 1947?

A. No, sir, I didn't receive any.

Q. Did you ever see that envelope?

A. No, sir.

Q. Did you ever see the contents of that?

A. No, sir.

Q. Did you ever know there was such a letter?

A. No, sir.

Q. Mr. Crenshaw, who—will you explain to the Court who is the person who has the right to the rents and is in charge of the rents?

A. You will have to get up here.

Q. Who is the person who is in charge of the rents to the Crenshaw Apartments, to whom the rents are delivered and who [104] has those apartments?

A. You mean at the present time?

Q. No, at the time this action was brought.

(Testimony of B. M. Crenshaw.)

A. Mr. Charles Bell, who was trustee for the R. F. C. Mortgage Company.

Q. What was your capacity as to the monies that were taken in from that apartment?

The Court: Under the trust agreement?

Mr. Bunker: Under the trust agreement.

The Court: Where is the trust agreement?

Mr. Bunker: I never had one, I just know it is signed with the R. F. C. office in Helena, Montana.

The Court: You had better bring it here. His interpretation of the trust agreement is not going to mean anything to the Court. You had better get it here into evidence.

Q. Did you have any authority over the money that was taken in?

A. Only to turn it over to Charles Bell.

Q. Did you turn it over to Charles Bell?

A. Yes, sir.

Q. Mr. Crenshaw, at the time in 1947, the time that all of these alleged overcharges were made, was there a mortgage on these premises?

A. Yes, sir.

Q. To whom was the mortgage given? [105]

A. The R. F. C.

The Court: Just a minute, now, if you want to go into that, if there was a mortgage, if it is of any importance here, bring the mortgage in; if there was a trust agreement, and if it is of any importance here, bring the trust agreement in. The position of the parties will be determined by what the mortgage

(Testimony of B. M. Crenshaw.)

or trust agreement provides, not by what he says it provides or how he interprets it.

Mr. Bunker: Your Honor, I am not going to ask him what the arrangements were beyond the fact of what he had to do.

The Court: What he had to do and what he didn't have to do and what the trustee had to do is determined by the trust agreement, and the only way I can make a decision as to whether or not there is a trust agreement and as to what it provides for will be to see the trust agreement.

Mr. Bunker: May we then tomorrow mail to you a certified copy of the trust agreement as filed?

The Court: You had better present it in evidence. The way to do it is to present it here. I can't take what his interpretation of what the trust agreement provides. What does that mean to me? You and I, as lawyers, have a difficult enough time trying to figure out what those things mean. If you want the Court to make any finding based upon the fact that this man was just an agent for the trustee, you are going to have to show me, and it is going to be done by presenting [106] the matter in evidence.

Mr. Bunker: I presumed it might be presented the same as these copies that are left out now and the originals put in tomorrow by the plaintiff.

The Court: If you can make a stipulation as to what the agreement was, what it was, what it provided for.

(Testimony of B. M. Crenshaw.)

Mr. Bunker: We have delivered to the Office of Price Administration already a copy. A copy has been delivered to them.

The Court: I should think you might be able to get together on a stipulation.

Mr. Knowlton: I suppose this testimony is to the effect that Mr. Crenshaw, at least during some period of time, was the agent of some trustee under some kind of an arrangement. However, it appears he is the man who collected the rents, he is the man who set the rents, by his own testimony. The Act provides it shall be unlawful for any person to demand, receive, or accept any rent for any controlled housing accommodations in excess of the maximum rent. What he done with the money after he got it doesn't seem to be material, as I view the case.

The Court: For the Court's information, have you ever read the mortgage and trust agreement?

Mr. Bunker: I have, your Honor.

The Court: Does that put the title of the property (interrupted). [107]

Mr. Bunker: It puts the title to all the rents in the trustee.

The Court: But it doesn't put the control of the property out of the defendant here, does it?

Mr. Bunker: Yes, sir, it does, your Honor. It puts control in the trustee.

The Court: In what respect?

Mr. Bunker: Not only as to rents, but as to everything else, in the trustee.

(Testimony of B. M. Crenshaw.)

The Court: Of course, he had to keep the property up and the usual provisions, but it was his property, wasn't it?

Mr. Bunker: No, it wasn't.

The Court: It amounts to an assignment of the rents?

Mr. Bunker: Both an assignment of the rents and of the control.

The Court: If that is what it is, it doesn't mean anything, but if you think it does, bring it in.

Mr. Bunker: It was an assignment of both the rents and control, so that if Mr. Bell didn't want Mr. Crenshaw there, he could say, "Get out." That is what the trustee agreement was.

The Court: You had better present it in evidence.

Q. (By Mr. Bunker): You did see, then, prior to the changing of any of these rents, these orders made by the Office of Price Control for Apartment Number 24 for \$65 a month? [108]

A. Yes, sir.

Q. And you never saw any change from that?

A. No, sir.

Q. And you did see the Joseph D. O'Neill order for Apartment 20? A. Yes, sir.

Q. And you did see the order of Mrs. Davies for \$65, or was it someone prior to Mrs. Davies, on Apartment 12?

A. Yes, that was the theater guy.

Q. Do you know what his name was?

(Testimony of B. M. Crenshaw.)

A. Who is the owner of the theater?

Q. Russell? A. Russell.

Q. When Russell was there? A. Yes, sir.

Q. And he showed you that?

A. Yes, sir.

Q. On Apartment 14, you stated there was, in addition to the furniture that was to be furnished in Apartment 14, certain things had to be done?

A. Yes, sir.

Q. What were they?

A. I took out some furniture. He put in a lot of his, and I stored mine.

Q. Was that agreed to at that time? [109]

A. Yes, sir.

Q. That he would have to pay for the change?

A. Yes, sir.

Q. Will you explain to the Court whether the storing of your own furniture is an expense to you? A. Yes, sir.

Q. And the moving is an expense to you?

A. Yes, sir.

Q. Now, in Apartment 16, for Mr. Vallee, you have stated that you put in new furniture in there?

A. I had to take out two twin beds and put in a single bed and put in a bed in the single bedroom for the little girl.

Q. In other words, you furnished other and different furniture for him in there? A. Yes, sir.

Q. Was that explained to him when you rented it and agreed to? A. Yes, sir.

(Testimony of B. M. Crenshaw.)

Q. On Apartment 17, Mr. Henke, I think you said you had to remove some of the furniture in there and store it?

A. Some davenport and chairs and some odds and ends that he wanted to put in.

Q. Did you remove your furniture?

A. Yes, sir.

Q. Was it necessary? [110]

A. I had to get his in.

Q. Was that an expense to you?

A. Yes, sir.

Q. Was there an expense in the storage?

A. Yes, sir.

Q. In Apartment 18, I believe you stated there was some other furniture requested?

A. Yes, sir.

Q. What was that extra furniture?

A. It was a dresser of some kind.

Q. You increased the rent because of that?

A. Yes, sir.

Q. Was that agreed to between you and the tenant? A. Yes, sir.

Q. In Apartment 20, you had an order on that for \$75 in your hands at the time that Mr. O'Neill rented it?

A. I saw it a little while afterwards.

Q. Was there any conversation with Mr. O'Neill or D. A. O'Neill that he was to go to the rent office and get the change made?

A. I wouldn't remember.

(Testimony of B. M. Crenshaw.)

Q. You are not sure about that?

A. I wouldn't say for sure.

Q. On Apartment 21, you testified there was an extra bed, is that correct? [111]

A. Yes, sir.

Q. Was there any other change in Apartment 21 besides the furnishing of a baby bed?

A. Not too much. There might have been some more changes, but it is too much for me to remember all of that.

Q. You can't remember them all?

A. I can't remember them all.

Q. There was some changes requested, and on that you based your right to ask for extra compensation? A. Yes.

Q. Now, on this extra furniture, you have extra furniture for furnishing other apartments not now furnished, is that correct? A. Yes, sir.

Q. When you use that, is the using and use and removal wear and tear on the furniture?

A. Yes, sir.

Q. It is expensive to you? A. Yes, sir.

Q. On Apartment 21, you stated that Gregor, during the period asked about, owed you \$105 on the claimed rent? A. Yes, sir.

Q. And that time, I believe, was only two months?

A. I wouldn't know just exactly.

Q. That was from the 5th of March, 1948, to the first of [112] June, 1948, which would be March, April and May, 1948?

(Testimony of B. M. Crenshaw.)

A. I wouldn't know just exactly, but the record ought to show.

Q. That is what he has asked about.

A. It must have been.

Q. For those three months, did he owe you \$105 that was not collected? A. Yes, sir.

Q. So that the amount owed you is more than any possible overcharge on that apartment?

A. I wouldn't know, you would have to figure that out.

Q. Well, three months, and according to the admission here, Mr. Crenshaw, there is \$25 a month overcharge.

A. That is supposed to be \$65 the same as the rest.

Q. \$50 is what they have. A. I see.

Q. That would amount to \$75 wouldn't it?

A. Yes, sir.

Q. And the \$105 is more than the possible overcharge for three months?

A. Yes, sir.

Mr. Knowlton: It seems to me counsel hasn't established a good ground for that. He hasn't established that those three months were the only three months Gregor was there. He might have been there for three years. [113]

Q. In other words, he didn't pay as much as \$50 a month?

A. Not when you figure it all up.

Q. You say on Apartment 24, they asked for

(Testimony of B. M. Crenshaw.)

extra furniture because there was an extra girl that went in there, is that right?

A. I gave them coffee tables and a new davenport.

Q. That was an increase from the \$65 that was allowed to \$75 because of that extra furniture you put in there for them?

A. Extra furniture and an extra person.

Q. And one extra person. In other words, you rented the apartments for a certain number of persons, and if there were more than that, you expected a greater rent?

A. Yes, sir.

Q. Why?

A. Because of the increase of the tenants. You can't take care of three the same as you can two.

Q. In other words, there is a greater wear and tear on everything with three than there is with just two? A. Yes, sir.

Q. On Apartment, that is Ashmore, and you actually were short \$375 on the rents that were collected from Ashmore, is that correct?

A. Yes, sir.

Q. They left just about the end of the time stated here, did [114] they not?

A. It must have been, I would have to look it up.

Q. So that they never did pay the full amount of \$75 a month in any one month, did they?

A. They was always behind.

(Testimony of B. M. Crenshaw.)

Q. They were always behind. Now, on Apartment 48, Jones, from April 10, 1948, to June 1, 1948, what was that arrangement, Mr. Crenshaw?

A. They were a little married couple and didn't have any place to go. She used the south end bath and shower, and he used the boy's shower, and I let him have it for \$11.25 a week. They just wanted it for a while while they were there.

Q. They didn't keep it?

A. No, for just a short time.

Q. For the period (interrupted).

A. I think five or six weeks. I wouldn't know, somewhere along there.

Q. And at any week they could move out?

A. At any time.

Q. That was a one-room apartment. You had to furnish it for two, is that correct?

A. Furnished a double bed. There was a bachelor bed there and I put in a double bed.

Q. Is that the reason the charge was \$11.25, besides the fact they only wanted it by the week?

A. It is a one-person apartment. They wanted it for two persons.

Q. Mr. Crenshaw, do you know if on June 26, 1947, you were in Bozeman?

A. June, 1946?

Q. June 26, 1947?

A. I wouldn't know.

Q. Do you remember when you went to Tennessee in 1947?

(Testimony of B. M. Crenshaw.)

A. You got me there, Brother, I wouldn't know.

Q. You can't remember?

A. No, sir, that is too far back. Too much has passed through my mind since then.

Q. I think you were in Tennessee.

A. I wouldn't know. I can't swear to it.

Mr. Bunker: That is all the cross examination, I think, your Honor.

Redirect Examination

By Mr. Knowlton:

Q. You have testified, Mr. Crenshaw, a tenant showed you an order or some other peculiar ways that you got hold of information that the rents on certain apartments were \$75 and \$65, is that not correct? A. Yes, sir.

Q. You never did make any inquiry any place as to what [116] specifically the rents were on each individual apartment, did you? A. No.

Q. As a matter of fact, on some of these apartments, you have continued almost up to the present date charging \$75, is that right?

Mr. Bunker: Objected to as incompetent, irrelevant and immaterial, and improper redirect examination.

Mr. Knowlton: I will tie it up.

The Court: Sustained.

Q. When was the first time you were advised that the rents were different than you were collecting?

A. God only knows, I wouldn't.

(Testimony of B. M. Crenshaw.)

Q. Well, didn't you and your attorney go over the Requests for Admissions which were served on you, and you answered September 7, 1948?

A. I wouldn't know.

Q. These ones we are asking you about.

A. I never read that. I just signed it and gave it back to him.

Q. I can advise you that all the orders applicable to this case are attached to that Request. Did you make any inquiry then?

A. I never had any orders.

Q. After you saw the Request for Admissions you were attempting [117] to answer, did you make any inquiry as to what those orders might be?

A. I didn't, no.

Q. Did you pay any attention to the orders after you got copies of them in that manner?

Mr. Bunker: Objected to as argumentative and improper redirect examination.

The Court: Overruled.

A. What orders are you talking about?

Q. There were copies of orders attached to the request for admissions, in your answer to which you stated you denied you had ever seen most of them? A. I never saw any orders.

Q. At that time when you made your answers, there were copies of orders attached to the requests for admissions.

A. Admissions of what?

Q. The document you were answering, and this

(Testimony of B. M. Crenshaw.)

is a copy of it. It is our copy of the requests for admissions. We filed it and served it upon you and your attorney. That document to your left is your answer to those requests. Attached to those requests are groups of registrations and orders which you are asked to admit. You deny, if you look in there, knowledge of all the orders. Did you change your rental practice after you saw those orders or make any inquiry as to what effect they might have on your rental practices? [118]

Mr. Bunker: Objected to as incompetent, irrelevant and immaterial as to anything beyond this case. He is changing to the present time, which is not a part of this case.

Mr. Knowlton: It would certainly be proper as to the injunctive relief. Besides, Mr. Crenshaw has relied on his good faith.

The Court: Insofar as the injunctive relief is concerned, it is necessary and proper for the Court to know whether or not the defendant is now charging rents that are not authorized and whether or not those orders of the Rent Director have been called to his attention, and if, after they have been called to his attention, he is ignoring them, I think that is of importance to the Court, isn't it?

Mr. Bunker: At the time these interrogatories were answered, Mr. Crenshaw simply came into the office and I read him the questions (interrupted).

The Court: Well (interrupted).

Mr. Bunker: Just a moment, if I may, please.

(Testimony of B. M. Crenshaw.)

Then, he turned to these various registrations and the orders, and he said, "I don't know anything about them."

The Court: Well, you know when you hand somebody something, we can't help it if they don't look at it.

Mr. Bunker: He looked.

The Court: All of these were served upon him and upon you, and the government can't help it if he didn't look. If he [119] answered the questions, if he didn't know what he was answering, the government can't be bound by that, but he can be. He can't say he never saw or heard of these after they have been served upon him.

Mr. Bunker: He never looked at them.

The Court: Can he in conscience deny to this Court that those orders have ever been served upon him?

Mr. Bunker: I think these orders and matters shown to him were for the purpose of this case and nothing else. So far as he was concerned at that time, that is all he was interested in.

The Court: Isn't it of importance to this Court to know whether or not he is now charging rents over and above the rent authorized? Isn't it of importance for the Court to know that?

Mr. Bunker: I think if it is, it is the duty of the government to produce it and not make him incriminate himself in this Court.

The Court: The question is, is it of importance for me to know that?

(Testimony of B. M. Crenshaw.)

Mr. Bunker: Not in this case.

The Court: Isn't it important for the Court to know whether or not a violation is being made of an order?

Mr. Bunker: If it is, your Honor, it is up to the Office of Rent Control to produce it, and not up to the defendant. [120]

The Court: The copies of the orders were served upon him or upon you as counsel for the defendant, and the defendant made answer to that?

Mr. Bunker: That's right.

The Court: He must have known what the order was in order to deny it.

Mr. Bunker: Only to see if that corresponded with what was said here. That is all he looked at it for.

The Court: But he did know there was an order, and knowing there was an order, we can't help it if he never looked to see what it was.

Mr. Peterson: Isn't that a matter of inference? Isn't it objectionable at this time as improper re-direct examination? I submit it is a matter of inference.

The Court: It is a matter of inference, surely, but the Court is not supposed to be blind and dumb. I am supposed to find out all the facts of this case. Now, he has testified he did know about the orders. He knew there were orders; he knew that the Rent Director issued orders, and he knew that the tenants got copies of the orders. Now, he says

(Testimony of B. M. Crenshaw.)

that — and your contention is that — having heard and seen the order in one case, he just proceeded in the same way with reference to the other apartments because he thought they must be all the same. That is a question for the Court to consider, whether that is reasonable or not, or whether it would be [121] more reasonable for him, knowing there were other orders, knowing each apartment was handled separately, to inquire as to the other orders.

Mr. Bunker: The slips that you saw on the apartments 24, 12 and 20, were they in the shape of these orders, or were they merely slips showing what the amount of the rent was?

The Witness: I wouldn't know, just slips. Your Honor, the docket number that started me off was issued to the tenants in number 22. It is all on file in Washington. I wrote to my Senator and I wrote up to Tighe Woods and asked for a readjustment for all the apartments with the fifteen per cent advance. We never got a thing from the area office in Bozeman. I have a copy of the letter. I told him they issued orders without my consent, without consulting me in any way. Where they got the value, God only knows. That was dated — what was the date of that?

Mr. Bunker: That doesn't make any difference.

The Witness: The Judge asked for this. The Judge is entitled to the background, aren't you Judge? You want the facts of the case and what started it, don't you, Judge?

(Testimony of B. M. Crenshaw.)

The Court: I'll tell you what I want to know, and it is curious to me that you have so many people coming into the apartment that needed extra service.

The Witness: They asked for it and they got it.

The Court: You charged them for it? [122]

The Witness: Some of them I did, some I didn't.

The Court: That is the only explanation you have for the rents you charged?

The Witness: I think——

The Court: Answer the question. Is that the only explanation you have for the rents you did charge, your assertion that there was extra service you were giving your tenants?

The Witness: For the extra service?

The Court: Yes.

The Witness: For the extra cost of the furniture, wear and tear and depreciation.

The Court: The wear and tear and depreciation was an expense to you?

The Witness: Wear and tear on the property, everything.

The Court: That was all expense to you?

The Witness: Yes, sir.

The Court: That is why you were charging them, because it was money out of your pocket?

The Witness: It certainly was, your Honor.

The Court: It wasn't any money out of the trustee's pocket, it was money out of your pocket, is that it?

(Testimony of B. M. Crenshaw.)

The Witness: Most of it has been since the trustee turned it over.

The Court: You were the owner and operator of that apartment, weren't you? [123]

The Witness: I was the owner.

The Court: You were the operator?

The Witness: I operated it through Charles Bell.

The Court: You owed them some money?

The Witness: Yes, sir.

The Court: You fixed the rents on the apartments, didn't you?

The Witness: Yes.

The Court: You kept them going, you ran them, didn't you?

The Witness: I worked 24 hours a day for the last ten years.

The Court: You ran it, didn't you? You considered it yours? You considered it yours, that is why you worked 24 hours a day on it, isn't it?

The Witness: Yes, sir.

The Court: It was your apartment?

The Witness: Yes, sir.

The Court: Very well. Any further questions?

Q. (By Knowlton): I just want to ask you when Mr. Bunker showed you those things, you said you never saw them before. That is what you testified, isn't it? The Requests for Admissions with the orders attached and the registration copies attached, you told Mr. Bunker you never saw them before?

(Testimony of B. M. Crenshaw.)

Mr. Bunker: He never said that. He said——

The Court: Don't argue with counsel. Either challenge the [124] record or keep quiet. Direct your remarks to the Court.

Q. Didn't you go up to Mr. Bunker's office in connection with answering the requests for admissions, and didn't you sign a paper there. You have already stated you did sign it?

A. Yes.

Q. Didn't you go over the various things with Mr. Bunker that you were signing?

A. I don't think so. I figured they were all right if he presented it.

Q. In other words, all that happened at that time, Mr. Bunker didn't even ask you about the orders, whether you ever saw them or not?

A. We might have discussed them, I don't know. There is so much stuff come up.

Q. After you saw that instrument, did you make any change in your rental practices?

Mr. Bunker: Objected to as argumentative, incompetent, irrelevant and immaterial, and improper redirect examination.

The Court: Overruled.

Q. Did you change any rents after you were up to see Mr. Bunker?

A. I change them every day.

Q. You change them every day without regard to what they might be down at the office of the Housing Expediter.

(Testimony of B. M. Crenshaw.)

Mr. Bunker: Objected to——[125]

The Court: Overruled. Answer the question. Do you change the rents whenever you feel like it?

The Witness: Yes.

The Court: Without regard to the Rent Control Office?

The Witness: They wouldn't give me any co-operation.

The Court: Do you change your rents without any consideration of what the Rent Director might do?

The Witness: I take his \$65.

The Court: And charge whatever you want to?

The Witness: No, not whatever I want to. If I charged what I wanted to, it would be \$100 to break even on the investment.

The Court: Do you fix the rents without regard to what the Rent Director fixes them at?

The Witness: No, sir. He fixed them at \$65. I figure I have the right according to law to charge 15% more.

The Court: 15% more than the Rent Director fixed?

The Witness: That is one reason.

The Court: You think you have the right to charge 15% more than what the Rent Director fixes?

The Witness: Yes.

The Court: What is the other reason?

The Witness: Service.

(Testimony of B. M. Crenshaw.)

The Court: Any other reasons?

The Witness: Furniture and service.

The Court: Furniture and service and you have the right to [126] charge 15% more than the rent director fixes the rent at?

The Witness: Yes, sir.

Q. (By Mr. Knowlton): You never entered into any leases in connection with the apartments?

A. No leases on the apartments.

Q. How many times have you yourself been in the rent office in Bozeman? A. Once.

Q. When was that? A. The 16th of March.

Q. 1946? A. It must have been.

Q. Have you ever been in there since?

A. No, sir.

Q. Did you ever call at the office for information?

A. Mr. Bunker has, not me.

Recross-Examination

By Mr. Bunker:

Q. And you did pay attention to comparability of those \$65 and \$75 apartments, is that correct?

A. Yes.

Q. You thought you were doing right?

A. I thought I was doing right.

Q. That has been your policy? [127]

Q. Now, the question was asked you how many times you had been in the rent office and you said just once?

(Testimony of B. M. Crenshaw.)

A. On the 16th of March, 1946, when they came in there.

Q. At that time, who was with you?

A. What was that?

Q. At that time, who was with you?

A. E. F. Bunker and Charles A. Bell.

Q. Is Charles A. Bell the trustee we have spoken of?

A. Yes, sir.

Q. Bunker is me?

A. Yes, sir.

Q. At that time, who was present in the rent office?

A. Mr. DeNayer and some girl, I don't know her name, and two or three or four more.

Q. Did you at that time, with Mr. Bell's consent, make any direction to them as to where notices would be given?

A. I told the rent director at that time to send all the papers to Mr. Bunker. I said, "I have made arrangements with him to take care of all the office work and would give the stenographer extra money for her services. Anything that came up would have to go through Mr. Bunker's office."

Q. Did Mr. Bell agree to that at that time?

A. Yes, sir.

Q. So far as you know, was that agreeable to them, did they take it down? [128]

A. They never objected.

Q. Didn't they say that was all right?

A. Yes.

Q. Did any ever come to my office that you know of?

A. What is that?

(Testimony of B. M. Crenshaw.)

Q. Was anything sent to my office that you know of unless you brought it?

A. If it was, you took it up with me.

Q. Did you ever know of anything being taken up with you that came from the rent office to me?

A. Not yet.

Mr. Bunker: That is all.

(Witness excused.)

The Court: It is at such hour now that the Court has other work to do.

Mr. Knowlton: If your Honor please, I have a number of witnesses here who come all the way from Bozeman. I brought them. They are here, some in this case and some in the next case. If Mr. Crenshaw is going to give the same testimony so far as rents are concerned tomorrow as today, I see no reason why I can conscientiously keep these witnesses here.

The Court: Well, of course, Mr. Crenshaw's testimony has been, to some extent, at least, that the rents have been charged, not for the rent of the apartment itself. There may be some evidence to that effect that it wasn't for the rent of the apartment [129] itself, but for some other service he rendered. If the matter is of importance to you, I think you had better keep your witnesses. Court will stand in recess until five o'clock. This case will be continued until ten o'clock tomorrow morning.

(Whereupon, the trial of this cause was recessed until 10:00 o'clock the following morning, September 28, 1949, at which time the following proceedings were had:)

The Court: Proceed.

Mr. Knowlton: The Clerk advises me that the records and exhibits introduced in connection with the case of Fleming vs. Crenshaw, 306, and Woods vs. Crenshaw, 344, arrived this morning.

The Court: You can make such examination of them as you wish, and I'll make an order on it when you pick out the exhibits you are interested in. I can make an order withdrawing them in the other file, making them available for introduction here. You could do that some other time. Let's proceed here.

Mr. Knowlton: I think I will recall Mr. Crenshaw for one more question.

B. M. CRENSHAW

recalled as a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct Examination

By Mr. Knowlton: [130]

Q. Mr. Crenshaw, did you ever, from time to time, receive mail from the office of rent control in Bozeman? A. I don't think so.

Q. Never received any. Did you ever destroy any mail you received? A. No, sir.

Q. Nor threw it away before looking at it?

(Testimony of B. M. Crenshaw.)

A. No, sir.

Q. You can't recall ever having received any mail?

A. I have received letters, I am quite sure I received one or two.

Q. That is all you can remember?

A. They wasn't registered, they was direct.

Cross-Examination

By Mr. Bunker:

Q. Mr. Crenshaw, you were asked yesterday if you made any appeal from the orders of the Housing Expediter or whoever was in charge at the time, from any of the orders. I think you said you never had. Is that right?

A. I never appealed from them, but I wrote direct to Tighe Woods and asked for an outside inspector to come in and give me a fair adjustment.

Q. Why did you do that?

A. They never gave me any satisfaction, and I figured they [131] wouldn't give me any, so I wrote direct to him.

Q. They also, they testified yesterday, Mr. De-Nayer, that you had evicted some of the housing men. Did you know they were housing men at the time you threw them out?

A. No, sir, I did not.

Q. Did you put them out?

A. Yes, sir.

Q. Explain why you did.

A. They were down knocking on No. 1 door

(Testimony of B. M. Crenshaw.)

and I happened to come to the stairway. Coming to the bottom, I asked what they were doing, and they said they wanted to get into the apartment to look the apartment over. Mrs. Applegate — her daughter is just like a baby doll — was standing there and said, “I don’t want you here, I am satisfied. Mr. Crenshaw started me out and put me over here,” she said, “and I am satisfied. We are not arguing about anything in the world.” I said, “You fellows get out of here.” I goes back upstairs expecting trouble, and I gets my club about that long (indicating), the tail end of a billy. He started reaching in his pocket and I grabbed him by the back of the neck with my right hand and kicked his feet out from under him and throwed him out the front door. Coming back, another one was standing there. He didn’t start to put his hand in his pocket and I just reached up and grabbed him by the neck, for I figured he was his pal. I felt me being the owner of that property and trying to protect my property and [132] protecting my tenants that I have the right to put them out.

Q. Was it to protect certain tenants in that apartment house?

A. Yes, sir, I had orders from — I don’t know the doctor’s name, but it was Baxter’s daughter. What is her name?

Q. Anderson.

A. Anderson. I never did know her by Anderson. I always called her by her first name. He

(Testimony of B. M. Crenshaw.)

says, "I am tickled to death the girl is over there. She is six months gone. I know she is going to be happy there, she is going to have protection. Her husband is out in Seattle." And he complimented me. He said, "It is wonderful I have such a good place for my daughter to stay." "I will take care of her the same as if she was my sister or daughter or mother or anybody else," I said.

Q. What you meant when you said Mrs. Anderson was six months gone was that she was six months pregnant, isn't that right?

A. Yes, sir.

Q. She was in a delicate condition?

A. Real serious.

Q. Seriously ill?

A. Yes, sir, this doctor gave orders that nobody was to bother her in any way, shape or form.

Q. Did you have some other difficulty with people coming in and rapping on doors or making a disturbance? [133]

A. A little while after that, Mrs. Whitaker's boy came back from the South Pacific. We tried for a year and a half to sober him up. We would pick him up on the stairway and take him up and put him to bed.

Q. Did you have to evict other persons from the apartment house?

A. I had to call up the police to take these out. There was two of them, and I didn't want to tackle two of them.

Q. Mr. Crenshaw, were you present when Mr.

(Testimony of B. M. Crenshaw.)

DeNayer was informed by me that any time they wished to inspect that apartment house that they should come to me, and if they couldn't find me, to come to you and request it, and we would arrange to have them see any apartment at a convenient time? A. Yes, sir.

Q. Did he ever come to you?

A. Never did show up.

Q. Did you ever know of his coming to me?

A. I never knew of it.

Q. Were those men there on an inspection, do you know, or what were they there for?

A. I didn't know whether they were O. P. A.'s or what they were.

Q. That is, on this day that you put these men out, did they on that day come to you or attempt to come to you? A. I never saw them. [134]

Q. Were you in the building at the time?

A. I was in my office and apartment, my home at 13.

Q. Was this matter brought up at a former hearing in this Court? A. Yes, sir.

Q. Where was that? A. Helena, Montana.

Q. Was that the United States District Court?

A. Yes, sir.

Q. What was the result of the matters as brought up there at that time? .

A. Judge Brown complimented me on my protecting my tenants and my property.

Q. Now, on yesterday, Mr. Knowlton called some attention to one or two mistakes you made

(Testimony of B. M. Crenshaw.)

in your affidavit in answer to their interrogatories, and what have you to say as to how that happened?

A. If I made a mistake, it was a mistake in good faith. I didn't want to do anything wrong in any way, shape or form.

Q. Your denials were upon the basis of what you thought was right?

A. I wanted to protect my property and my tenants.

Mr. Bunker: You may examine. [135]

Redirect Examination

By Mr. Knowlton:

Q. You just explained what the tenant told the man that was talking to her, the woman by the name of Anderson——

A. Wait a minute.

Q. Somebody was talking to this Mrs. Anderson?

A. No, no, Mrs. Applegate.

Q. Whereupon you threw him out of the building?

A. When he came upstairs after the conversation.

Q. You didn't hear the conversation?

A. I heard her tell him she didn't want to be bothered.

Q. Did you hear any part of the conversation?

A. They wanted to get in the apartment.

Q. For what purpose?

A. That is what I didn't know.

(Testimony of B. M. Crenshaw.)

Q. You heard the conversation?

A. How could I tell?

Q. You were principally afraid they would find a violation in your apartment?

A. I would have been glad for them to see that apartment. It is one of the best apartments in the building. I would be glad to show them if they had come up and I could have made arrangements.

Q. By the way, why do you keep a club on each floor?

Mr. Bunker: Just a minute——[136]

Q. He testified to that effect. I want to know why?

Mr. Bunker: He never testified to that, we object. A. Yes, I did.

The Court: Objection overruled.

A. I have got them there right now.

Q. What for?

A. For to protect my tenants.

Q. From whom?

A. Drunks coming in there and laying on the stairway.

Q. Your apartment house must be in a rather poor section of town?

A. It is the best section of town. We have some of the best people in America there. I am going to protect them. It is one way I have to protect them. I never packed a six-shooter in my life, and I never will.

Q. You said that Judge Brown complimented you at some previous case tried in Helena?

(Testimony of B. M. Crenshaw.)

A. It is in the record.

Q. He also found you wilfully violated the Price Control Act in overcharging your prior tenants, didn't he?

A. Didn't I pay the fine?

Mr. Knowlton: That is all.

(Witness excused.)

The Court: Call the next witness.

Mr. Knowlton: Plaintiff will close his case.

The Court: Before formally closing your case, maybe you had better arrange to make substitution of the exhibits for the record.

Mr. Knowlton: I should like to do so after I have had an opportunity to examine the records and decide which ones to substitute.

The Court: Court will stand in recess for 10 minutes to give you such time.

(10-minute recess.)

Mr. Knowlton: I think I have this line up here, if your Honor please. On Plaintiff's Exhibit 1 introduced here, which is the entire file, in Cause 306, Fleming vs. Crenshaw, the original registration was introduced there as a plaintiff's exhibit in that case; also the registration is in the — by the way, the order plaintiff claims was made was indorsed on the back of the registration which was introduced in the previous case, so Mr. Crenshaw must have necessarily known about it at that time.

The Court: You needn't argue about the matter

at this time. Is there any objection to the introduction at this point?

Mr. Bunker: I haven't made any comparisons.

The Court: I think this is a matter you should be able to agree on. However, it is up to you. Court will stand in recess for 15 minutes to give you an opportunity to compare those.

(15-minute recess.) [138]

Mr. Knowlton: In place of Exhibit 1, which is this file we introduced in this case which contained this instrument, which is the order referred to on the back of the registration, in place of the whole thing, I would like to introduce and substitute a document marked Plaintiff's Exhibit 1, which was introduced in the case of Fleming against Crenshaw, 306, Helena Division. I request to withdraw Plaintiff's Exhibit 1 in Cause 306, Fleming vs. Crenshaw, and have it introduced in this case, together with this instrument here, and also withdraw the original Plaintiff's Exhibit 1. I would like to have these documents marked for convenience 1 and 1-A

The Court: Any objections?

Mr. Bunker: That is satisfactory.

The Court: Very well, let that be done.

(Plaintiff's Ex. 1-A, being Order Fixing Rent on Apt. 1, here received in evidence, will be certified to the Court of Appeals by the Clerk of the District Court.) [139]

Mr. Knowlton: In place of Plaintiff's Exhibit

6, in this cause, I should like to substitute the Plaintiff's Exhibit 3 in the case of Fleming vs. Crenshaw, No. 306, Helena Division, and withdraw Plaintiff's Exhibit 3 from the Fleming vs. Crenshaw case.

Mr. Bunker: Okay.

The Court: Very well.

Mr. Knowlton: This, I suppose, will have the same exhibit number, No. 6. In connection with Plaintiff's Exhibit 7 in this cause, I should like to withdraw Plaintiff's Exhibit 7 and substitute for it Plaintiff's Exhibit No. 4 in the case Fleming vs. Crenshaw, No. 306, Helena Division, and withdraw Plaintiff's No. 4 from the Crenshaw-Fleming case.

Mr. Bunker: No objection.

The Court: Very well, let it be done.

Mr. Knowlton: I would like to withdraw Plaintiff's Exhibit No. 5 in the case of Woods vs. Crenshaw, No. 344, and add it to this case as Plaintiff's Exhibit 5-A. Now, if your Honor please, Plaintiff's Exhibit 5 was a copy of the registration with an order endorsed on the back. The chief reason why I introduced it was to show the order on the back of it. The original of the order can be compared with the notation; it is the same as the order that was introduced in that cause, No. 344, and I should like to add it to this cause as Plaintiff's Exhibit 5-A.

Mr. Bunker: No objection to the exhibits.

The Court: Very well, it will be done.

Mr. Knowlton: If your Honor please, I find

there is already Exhibit 5-A. I should like to make this new one 5-B.

The Court: Very well.

Mr. Knowlton: I think that will take all of the copies out of this file, your Honor.

The Court: Very well.

Mr. Bunker: May we say to the Court at this time that Action 306 was an action tried on the 6th or 8th of January, 1947 for alleged violations prior to that time some five or six months. The matters covered by the last exhibit, and also [140] by the stamped marks on the back of those were not a part of the 306 case and were not known to this defendant at any time for the reason that they were not a part of the case, and all that was in question at that time when those exhibits were allowed without objection was the question of whether he had registered at that price. That was the purpose of the exhibit, and nothing more. That was the purpose in the other case, so that I don't want these to be taken as notice to Mr. Crenshaw of anything other than his own registration.

The Court: I don't see that they were introduced in another case for a different purpose and I don't see that their use in another case is of any evidentiary value here.

Mr. Bunker: That's right, your Honor.

The Court: Proceed with the defense.

B. M. CRENSHAW

defendant, called as a witness in his own behalf, having been previously sworn, testified as follows:

Direct Examination

By Mr. Bunker:

Q. Mr. Crenshaw, in arriving at your prices for your apartments in the Crenshaw Apartments, did you or did you not, in considering the orders which you had seen of the rental values of various apartments and on like apartments, consider you were permitted to charge like rents? [141]

A. Yes, sir.

Q. And did you do that? A. Yes, sir.

Q. I understand that in some of those you were requested and gave services over and above what other apartments received, and for that you made an extra charge, is that correct? A. Yes, sir.

Q. Did you believe you were entitled to that?

A. I certainly did.

Q. Were they because of your work and labor expenses and you expected to be reimbursed?

A. Yes, sir.

Q. That is why you did that? A. Yes, sir.

Q. Did you, at any time, intend to go above what you were permitted to go? A. No, sir.

Q. In other words, did you think you were acting in perfectly good faith at all times? A. I did.

Q. That is what you were trying to do?

A. All the way through.

(Testimony of B. M. Crenshaw.)

Q. When you wrote your letter to Mr. Woods, was that what you were attempting to do?

A. To the best of my ability, at that time I wrote, I was in [142] good faith all the time.

Q. Did you feel that you had not been given the opportunity of acting in good faith with the Board existing in Bozeman? A. I did.

Q. Did you object to that board? A. Yes.

Q. Have you objected at all times to that Board?

A. Yes.

Q. Your objection has been because you couldn't get anything definite out of them, isn't that correct?

A. No action, nothing definite.

Q. Do you, at this time, still desire to get this matter of equipment on a basis so you can proceed without difficulty with the Board?

A. That is the reason why I signed those 41 applications.

Q. And you wish to comply in all ways that you can with the regulations?

A. I certainly do.

Q. I want to ask you one further question. Do you know whether the Office of Price Administration at Bozeman was given the opportunity to make inspections of those apartments at any time, simply upon request for permission to do so?

A. You will have to repeat that.

Q. Do you know, and were you present at the time that the Office of Price Administration officials were given notice [143] that they could in-

(Testimony of B. M. Crenshaw.)

spect and see any of these apartments at any reasonable time?

A. Yes, that was March 16th. That is when I told them I would be glad to make arrangements at any time, take it up with the tenants. I didn't want them going in before breakfast or after supper. I wanted them to be satisfied with the time they came. I would be glad to make arrangements.

Q. At a later time, were you present in my office when Mr. DeNayer was told that at any time he wanted to request permission, to come to me, and if I were not present to go to you and get permission to go in?

A. Yes, I would be glad to make arrangements.

Q. Were you ever requested to permit anyone to go into that apartment?

A. I never was, no.

Q. Do you know whether I was or not?

A. I don't think so.

Mr. Bunker: You may examine.

Cross-Examination

By Mr. Knowlton:

Q. You stated, Mr. Crenshaw, at the present time you are quite willing to comply with all the regulations relative to the Housing Expediter's office?

A. I have been that way all the time. [144]

Q. However, you have changed the rents, and you haven't petitioned the Board, save in the last couple of weeks, and back in 1946?

(Testimony of B. M. Crenshaw.)

A. Those are the first notices I ever received.

Q. But you never bothered to petition anybody yourself?

A. I had left instructions to give them to Mr. Bunker.

Q. From September, 1946 to September, 1949, you have never filed a petition?

A. I asked Tighe Woods for an adjuster to come in and adjust it. What else could I do?

Q. You never filed a petition with the office here in Bozeman, did you?

A. I didn't figure I would get any action or a fair deal.

Q. As a matter of fact, hasn't it been your policy to keep agents of the Housing Expediter out of your place?

A. I have had them in there. I had four of them in there and visited with them for half an hour and asked them to adjust one injustice is all I asked them. I asked them to explain why this one was \$65, another one \$45 and another \$75. I asked them that. I couldn't figure it out. I never went through law school. The seventh grade is as far as I have gone, but I can add and subtract. That is the reason why I asked Mr. Bunker to take this work over. I didn't know nothing about this at all. Your Honor, that is the reason why I asked Mr. Bunker to take care of it. [145]

The Court: You say you want to comply with the orders of the Rent Director?

(Testimony of B. M. Crenshaw.)

The Witness: I have all the time.

The Court: You now know what those orders are?

The Witness: Yes, sir.

The Court: You will comply?

The Witness: I will.

Mr. Bunker: We have, your Honor, petitioned.

The Court: That is within his rights. He can petition and follow the procedure provided by law. The point I want to understand is his statement that he wants to comply. There is now no doubt, is there, what the orders are as to what rent you can charge for these various apartments? You know what that is now?

The Witness: I expect to find out.

The Court: You know?

The Witness: I expect to find out from these 41 applications.

Mr. Bunker: I may say, your Honor, we are going to ask the office at Billings to send us a listing on each and every apartment. I am frank to tell you I still don't know what the rents on any apartments are, only some of those in this case.

The Court: You can take the orders that have been introduced in evidence here. You have an opportunity to examine them. I think you have seen them. Those are orders fixing the maximum rent you can charge for the particular apartments. Do you [146] understand that?

The Witness: Yes, sir.

(Testimony of B. M. Crenshaw.)

The Court: It is your desire to follow those orders, is that right?

The Witness: Yes, sir.

The Court: You never knew that any of these orders existed?

The Witness: No, sir, I never saw a one of them, your Honor.

The Court: I didn't ask that. Did you know these orders existed?

The Witness: No, sir.

The Court: You knew some orders existed, didn't you?

The Witness: Some of them.

The Court: Did you know that each apartment was considered a separate accommodation and separate orders were issued on each apartment, did you know that?

The Witness: That is what I tried to put through all the time. My 30 apartments are all the same value. That is what I have been fighting for.

The Court: That is what you contend. That is not what I am asking you now. If you will just answer the questions. Did you know each apartment was considered separately?

The Witness: Yes, sir.

The Court: And that a separate order was issued with reference to each separate apartment.

The Witness: One or two orders, I have seen, and no others. [147]

The Court: I am not asking that. Now, if you will just answer my question, and then you can

(Testimony of B. M. Crenshaw.)

explain it after you answer my question. Did you know they issued separate orders for each apartment?

The Witness: Yes, sir.

The Court: Do you want to explain that any further?

The Witness: I would like to know why they issue an order for \$65 right over 10, and then they go into the Federal Court in Helena and get an order that I am not to bother that woman or charge her more than \$35 a month. She has been in there 40 months, an undesirable tenant for various reasons, and the one next to it——

The Court: You are not going to get any place with me saying that Judge Brown, sitting in this Court, didn't do the right thing. That was a fair trial you got in this Court. You are not impressing me by saying he didn't handle your case properly.

The Witness: I am not saying he didn't handle it properly. I told you what he did.

The Court: You knew there were separate orders on each apartment?

The Witness: Yes.

The Court: A number of separate orders you actually saw?

The Witness: Some of them I actually saw.

The Court: You made no effort to find out what the particular orders were with respect to the apartments concerning which you [148] didn't see the Director's order? You didn't check?

The Witness: I took the order to Mr. Bunker.

(Testimony of B. M. Crenshaw.)

I says, "Find out, if you can, why this establishes \$65 and \$35 and \$75.

The Court: Let's take, for example, Apartment 21, if you didn't see the order in that case. Did you see the order fixing the maximum rent with reference to Apartment 21?

The Witness: No sir, 22.

The Court: On 22.

The Witness: 22, I saw *that*.

The Court: You didn't see the one with reference to 21, you didn't see that one?

The Witness: No, sir, 20 and 22 is the only ones I have seen.

The Court: But you yourself made no effort to find out what the order was?

The Witness: I took them to my lawyer and I says, "Find out, if you can."

The Court: You took them to the lawyer to find out why the difference?

The Witness: Yes, sir.

The Court: Did you make any effort to find out what the order was with reference to Apartment 21?

The Witness: I didn't know whether there was an order or what you would call it. One explains the docket number some way. They get me all confused. [149]

The Court: What I am trying to find out is, you contend you were acting in good faith?

The Witness: Yes, sir, all the time.

The Court: I want to find out what your actions

(Testimony of B. M. Crenshaw.)

were that establish your good faith. We first proceed on the basis that you did know that separate orders were issued with references to each apartment?

The Witness: Yes, sir.

The Court: Some of those orders you say you didn't receive, didn't see?

The Witness: I didn't see them.

The Court: You did see some of them?

The Witness: I did see some of them.

The Court: With reference to those orders that you didn't receive, you knew there were orders on those apartments?

The Witness: No, I didn't know there were orders on them.

The Court: You didn't know there were orders?

The Witness: How could I know if I didn't see them or Bunker inform me of them.

The Court: Some tenants showed you copies of the orders they received?

The Witness: In 22.

The Court: You never asked the tenant in 21 if he had received a copy of an order?

The Witness: I found out he did have an order, but I didn't [150] see it.

The Court: But you knew it had been issued?

The Witness: Yes.

The Court: How about in connection with Apartment 4 and all of the other apartments that you say you didn't receive the orders on, did you discuss those with the tenants?

(Testimony of B. M. Crenshaw.)

The Witness: Not Number 4, Number 4 is an O. P. A.

The Court: With Apartment 16, did you discuss that order with the tenants of that apartment?

The Witness: No, sir.

The Court: Did you discuss it with the tenants of any of the apartments other than the ones that you have already mentioned?

The Witness: Just 22.

The Court: 22 is the only one you discussed it with. You didn't ask any other tenants whether they had received copies of the orders?

The Witness: I didn't make any inquiries.

The Court: Did you know whether or not they had received copies of the orders?

The Witness: I did not.

The Court: You have testified that you have had difficulty with the Rent Director's office in Bozeman?

The Witness: My lawyer did, I didn't, for I never was in there. [151]

The Court: You said your relationship with the office was not good, is that right, or what was the situation between you and the Rent Director's office in Bozeman?

The Witness: I never went in there, and he never visited me.

The Court: You had no difficulties at all?

The Witness: Mr. Bunker and him did, not I.

The Court: You didn't?

(Testimony of B. M. Crenshaw.)

The Witness: No, for I didn't contact him.

The Court: Your only interest was in following the orders of the Rent Director?

The Witness: He would put them through Mr. Bunker, and Bunker would give them to me.

The Court: Just answer the question. Is that what your only interest in connection with the Rent Office was, following orders?

The Witness: I would have if I had them, but I didn't have them.

The Court: You will do much better with the Court, Mr. Crenshaw, if you will answer my questions. When I ask you a question, don't answer something else, don't tell me what you would have done under some other circumstances. Just answer the question that I ask you, and then after you answer the question, if you think there is something more you want to tell me or you think I should know in order to know the whole truth, then tell me, but answer my questions as I put them to you. Now, in [152] connection with your relationship with the Rent Director's Office, do I understand your contention to be that your only interest was to find out what the orders were and then to follow those orders?

The Witness: Yes, sir.

The Court: But you never went to the Rent Director's office?

The Witness: No.

The Court: Do you ever know of the Rent Direc-

(Testimony of B. M. Crenshaw.)

tor or any employee of the Rent Director's Office coming to your apartment, your residence?

The Witness: There was three come there one time, they come from Denver. We had quite a visit for about half an hour, but I wouldn't know the date.

The Court: What was the nature of the discussion?

The Witness: I told them I had seven O. P. A.'s, and I asked them if there was any accommodations. They said there wasn't a thing. I wanted some of them to move to improve the property.

The Court: What did they come to see you about?

The Witness: They had come on an official visit was all I thought. That is all I discussed with them. When they couldn't do anything there, they said they might just as well go back to Denver.

The Court: The question of maximum rent was never discussed between you?

The Witness: Yes, the order for \$65 and the O. P. A.'s \$35. [153]

The Court: You did discuss the orders?

The Witness: Yes, sir.

The Court: Concerning which apartments did you discuss the orders?

The Witness: Numbers 5, 3, 4, Number 10.

The Court: You didn't discuss the maximum rent orders with reference to any other apartments?

(Testimony of B. M. Crenshaw.)

The Witness: No, they didn't bring that up.

The Court: Neither did you?

The Witness: I wanted them all adjusted as all my apartments, the 18 in the gym, are exactly the same size and practically the same furniture. Why can't I get the same price for all of them?

The Court: You did discuss the maximum rent for each apartment?

The Witness: I guess that would be what you would term it.

The Court: Did you discuss it in the light of what orders had been issued?

The Witness: I says, "Why can't they be all \$65?"

The Court: You knew they were all different?

The Witness: I knew they were all different.

The Court: You were asking them to change them?

The Witness: Yes, sir.

The Court: Any objections to the Court's questions?

Mr. Bunker: None, your Honor. If I may ask a question, [154] I think I can clarify this.

Redirect Examination

By Mr. Bunker:

Q. This, Mr. Crenshaw, was immediately following Dr. Ritter's disclosure to you of the \$65 order, was it not? A. Yes, sir.

Q. Thereafter, there was no conference with you

(Testimony of B. M. Crenshaw.)

after you discovered the other apartment was \$65 also, was there?

A. No conference after that.

Mr. Bunker: I think that is right, sir. That is all.

The Court: Very well, that is all.

(Witness excused.)

EUGENE F. BUNKER

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Peterson:

Q. Your name is Eugene F. Bunker?

A. Yes, sir.

Q. What is your profession, Mr. Bunker?

A. Attorney at law.

Q. You are duly authorized and licensed to practice in all of the Courts of the State of Montana?

A. Yes, sir. [155]

Q. Where is your office and residence?

A. Bozeman, Montana.

Q. Mr. Bunker, you have heard testimony in this case, of course, given by Mr. Crenshaw?

A. I have.

Q. Referring to a pertinent item, that is Apartment Number 12, and a certain order issued, will you tell the Court the circumstances of that order, as far as you know?

(Testimony of Eugene F. Bunker.)

A. Mr. Crenshaw came to my office and stated to me that Dr. Ritter had shown him an order for \$65 on that apartment, and asked me to investigate at the Office of Price Administration as to the other apartments. I went to the office of Price Administration in Bozeman, Montana. There was a girl there, which one she was or who she was, I can't tell you, the girl in charge of the office. She went to the files and turned and came back and said that that file and most of the others are in Billings and she would have to notify me later. I was never notified later of anything.

Q. Now, Mr. Bunker, does that conversation refer to Apartment Number 12 or 22?

A. Which one was Dr. Ritter in—22, I beg your pardon, I guess it was 22.

Q. Did I understand you had notice of that order?

A. Through Mr. Crenshaw.

Q. There has been some confusion here and conversation about [156] notices. As Mr. Crenshaw's Attorney, have you made visits to the Rental Office at Bozeman?

A. Many times.

Q. For what purpose?

A. For the purpose of trying to find out various matters concerning the apartments. I was there, I was over to see if it were possible to have one or two, I think, tenants removed from the top floor of the main building in order that Mr. Crenshaw could complete about eight or 10 full apartments instead of having bachelor apartments, single room apartments.

(Testimony of Eugene F. Bunker.)

Q. Have you, as his attorney, endeavored to bring about compliance with the rental regulations of that area? A. I have.

Q. What, if any notice—what, if any, understanding did you have with the Rental Office in Bozeman as to notices?

A. Immediately upon having filed the original registrations, Mr. Crenshaw stated that he was very busy. I think he was at the time attempting to stop leaks in his roof. It was in April and the snow was coming through. He said that he wasn't coming back to the office. He had attempted to tell them during the registration various matters concerning the various apartments and what he intended to do with those apartments. They had cut him off pretty short. And he had also stated to them that he was pretty busy and maybe he had made some mistakes and that he wanted all the papers to come to me. Mr. [157] Bell, who was trustee there, was present at the time with Mr. Crenshaw. He said that would be the better way and asked if they would do it. The girl replied she would. Mr. DeNayer was back and forth during all the conversation. Whether he was there at that time or not, I can't tell you, but he was in the office. She stated that would be done.

Q. Do you want the Court to understand that this conversation took place in the presence and hearing of Mr. DeNayer?

A. That's right.

(Testimony of Eugene F. Bunker.)

Mr. Knowlton: You just stated you didn't know that.

The Witness: I stated he was there, but he should have had immediate notice from his clerk.

The Court: You can cross-examine, but don't interrupt and argue with the witness.

Mr. Knowlton: I apologize, your Honor.

Q. Have you been in on more than the two occasions which you have mentioned? I refer to the Rental Office in Bozeman.

A. I have been to the office a great many times.

Q. Have you been in frequent touch with the office by telephone conversations?

A. Many times.

Q. Have you received any notices of any orders?

A. Never.

Q. Neither in writing nor orally?

A. Never, other than answers to my questions. At the time [158] Mr. Crenshaw completed his new apartments, I called the office to ask them if it were necessary that we re-register. He informed us that it wasn't, that they didn't want any registrations.

Q. As to the inspection of the premises known as 6 West Babcock Street in Bozeman, Montana, has there been any conversation between yourself, as attorney for Mr. Crenshaw, the landlord here, the proprietor, and the Rental Office there concerning investigations?

A. Yes.

Q. Will you tell the Court what that has been?

(Testimony of Eugene F. Bunker.)

A. In the first instance, the instructions, the conversation was to this effect: that if they desired to make an inspection of the apartments, that I would be glad to secure the permission and the time for them to make inspections, and if I were not in my office, that they should go to Mr. Crenshaw, but not to go direct. Thereafter, when this occurrence happened in the Crenshaw Apartments that Mr. Crenshaw has testified to, I went to Mr. DeNayer when I saw him in the office at Bozeman, and I told him not to go in there without notifying one or the other of us or see anybody else in there, that he was liable to catch Crenshaw in a bad mood and get thrown out.

Q. Was that utterance made on your part as a threat?

A. Not as a threat. It was made for the purpose of warning [159] him not to send somebody in there for the purpose of sneaking around. It was for his own good, not mine.

Q. I am not assuming that any member of the force there whose duty it was to discharge the provisions of the law ever did that, but at any time prior to any visit on their part, did they ever come to see you? A. No.

Q. Did they ever see you or come to your office prior to the occasion which resulted in the disturbance?

A. No.

(Testimony of Eugene F. Bunker.)

Q. Is there anything else you would like to tell the Court? A. Not that I know of.

Cross-Examination

By Mr. Knowlton:

Q. You made some inquiry about 22 at one time at the Rent Office? A. Yes.

Q. Weren't you able to find out what the rent was? A. No.

Q. You didn't make any inquiry about any other apartment?

A. No, I think when they didn't have the file there to show me how that order was secured and they said the other files were in Billings, that I didn't go any further.

Q. You were attorney for Mr. Crenshaw in the case of Woods [160] against Crenshaw, No. 344?

A. I presume, I don't know the number of the case.

Q. Haven't you represented Mr. Crenshaw in all the cases brought against him?

A. I think so.

Q. You have now stated that you have attempted to get Mr. Crenshaw into compliance with everything that came to your notice?

A. Yes, sir.

Q. This document was introduced in the cause of action of Woods against Crenshaw concerning

(Testimony of Eugene F. Bunker.)

Apartment 14. Mr. Crenshaw has testified that subsequent to that time he has charged much more; I believe he has testified he charged \$75 in connection with that apartment. Why didn't you get him in compliance with that order, which was for \$45?

A. Do you wish to tell me what times the violations arose in Action 344. I can't tell you. My memory was that that was a violation in 1946 prior to the \$65 orders.

Q. That record introduced in Cause No. 344 showed the rent to be \$45. Mr. Crenshaw has, after that, admittedly collected for that apartment \$75 a month.

A. At that time he had no notice, nor was it shown to him.

Q. You mean that you, as attorney for Mr. Crenshaw, didn't look at the exhibits as they were introduced in that cause and see that order? [161]

A. Certainly not, it is on the back of the exhibit up at the top where you couldn't see it to save your life. It was like that (indicating)—(interrupted)

The Court: Mr. Bunker—(interrupted)

The Witness: He is not telling me what I saw.

The Court: Mr. Bunker, resume the witness chair.

Q. You mean you didn't examine the exhibits before you passed them?

A. I mean just that.

The Court: This Court is not going to be a place for argument between counsel and a witness. Now,

(Testimony of Eugene F. Bunker.)

counsel can ask any questions that are admissible here, and the witness will answer them, and he will not argue with counsel. He will make whatever explanation he wishes to make, but it will not be in the form of argument. Proceed.

Q. If you will look at this document, Mr. Bunker, do you find anything on the back of that document?

A. That document was fastened together with the original registration. The original registration was the only matter in question at that time.

Q. But you never saw that at that time?

A. If I did, I didn't look at it. I wasn't interested, and the matter didn't have anything to do with this, nothing whatever. I looked to see only if that paper was signed by B. M. Crenshaw. If it was, I passed it. These papers were [162] all fastened together with a clip at the top. There was a stack of them a half-inch thick. I simply went through, and as I went through, I noted if there was any not signed by him.

Q. If you recall there was things not signed by Crenshaw, you must have objected to that and must have seen it.

A. Those papers were not asked about. They were a part of the file. They were subsequent to the matter on trial.

Q. The order establishing the maximum rent as of March 1, 1946?

A. It is dated four days before the trial.

(Testimony of Eugene F. Bunker.)

Q. I understand that.

A. It didn't have anything to do with the trial.

Q. Why didn't it have anything to do with the rent. The Rent Director has authority——(interrupted)

The Court: Don't argue with the witness.

A. It had no effect on the other case.

Q. That is your opinion?

A. No, it isn't my opinion, it is what I know. That is why I didn't object to it.

Mr. Knowlton: That is all.

The Court: Mr. Bunker, you testified you went to the Rent Director's office and had a discussion with the officials there with reference to making inspections of the apartment?

The Witness: That's right. [163]

The Court: What was the purpose of having inspections made?

The Witness: They requested inspections.

The Court: Who had requested inspections?

The Witness: Mr. DeNayer stated they wished to have inspections at various times.

The Court: It was upon the request of Mr. DeNayer that you went there to arrange for the inspections?

The Witness: The first time was when we were registering. Mr. DeNayer came over to the desk where we were registering and said at various times they might want to make inspections. At that time I explained to him and Mr. Crenshaw explained to him the matter of his being so busy and the matter

(Testimony of Eugene F. Bunker.)

of coming to us first if they wanted to make an inspection.

The Court: Your discussions with reference to that were not had upon the basis or for the purpose of having the maximum rents changed?

The Witness: Your Honor, my memory may be faulty, but I think the second time I went over and talked to Mr. DeNayer, many of these rooms had been changed from unfurnished to furnished, and I told him we would like to have them look at the furniture to see if everything was satisfactory and I asked him to come to me and let me take them through those rooms.

The Court: Did you ever ask the Rent Director to make an inspection of the apartments here involved, or any of them, in order to have the Rent Director change the order fixing the [164] maximum rent?

The Witness: Yes, I did, your Honor, that was very shortly—I think it was in May of 1946, I filed a petition for a change in rents and requested at the time of the filing of the petition that they come with me and go over the various apartments. They never came.

The Court: Well, at that time, in May, 1946, did you know of the various maximum rents that were set for each apartment?

The Witness: They hadn't been changed from the original filing only a month before.

The Court: May of 1946?

(Testimony of Eugene F. Bunker.)

The Witness: That's right, your Honor.

The Court: At that time the rents were fixed with reference to the original filing?

The Witness: That's right, your Honor.

The Court: At any time later then, did the matter of changes in the orders fixing the maximum rent ever come to your attention?

The Witness: Never, except, as I say, the one time when Mr. Crenshaw came to me and told me that—which I consider hearsay, of course—and I went to the office of the Director to find out if I was able. I was unable to find out, and I requested that any other change that would be made that notice be given to me.

The Court: So that the matter of the changes in the orders [165] was never called to your attention?

The Witness: They never were.

The Court: That is, it was never called to your attention by Mr. Crenshaw or the Rent Director?

The Witness: Yes, Mr. Crenshaw called my attention a considerable time later to another one at \$65—which one it was I don't know. Then, when this matter arose he told me about the \$75 one, which was the first time I knew that.

The Court: When did you first find out, Mr. Bunker, that there were maximum rent orders covering each separate apartment?

The Witness: You mean these secondary rental orders?

The Court: Yes, these orders that made changes.

(Testimony of Eugene F. Bunker.)

When did you first find out there were such orders?

The Witness: I don't know. I had never thought of it. As Mr. Knowlton called my attention to the fact it was in the file, if it was, I didn't pay attention to it. The only ones I knew were separate orders were the ones Mr. Crenshaw said he had seen.

The Court: With reference to those files, one in particular of which Mr. Knowlton questioned you about, those were part of the exhibits that were introduced in the other case?

The Witness: That's right.

The Court: And the particular matter here with which we are concerned, that is, the maximum rent order, was not in issue in that case, do I understand that? [166]

The Witness: That's right. I have a feeling, but I wouldn't say so positively, that I objected to the matters stamped on the back of the exhibits and the Court stated they would not be taken into consideration as being subsequent.

The Court: Isn't it probable then that at that time the maximum rent order was called to your attention?

The Witness: That there was such a thing?

The Court: That there was such maximum order?

The Witness: Yes, but I didn't think about it.

The Court: Would that be the first time you knew there was a change in the original rent registration?

(Testimony of Eugene F. Bunker.)

The Witness: I wouldn't say it was before or after the one I saw on 22.

The Court: How long have you known that there were maximum rent orders different than the original registration?

The Witness: I think when I received this case, 373, was the first time that it really percolated through my brain.

The Court: Has any effort been made since that time to comply with the orders?

The Witness: It has. We have attempted to find out just where we stood with reference to all of these things. The office has been closed part of the time down there, and in fact, you couldn't get in much of the time. I have been gone then, and it fell into abeyance. It was simply forgotten on my desk and in the files. I had gone over there, however, I would [167] say in June, and asked a girl who was in there at that time if she would make up a list of all of the Crenshaw Apartment rents according to their final orders. She said she was going to be there only a short time, but she would make a memo to that effect, and I never received that. I think this girl was there in that office only in an interim of some kind while the regular employee was not there. She was an employee of the office in Billings, I believe, this girl there in the office at Bozeman. That is my memory of it.

The Court: Do I understand your visit to the Rent Office on that occasion was after the commencement of the action in this case?

(Testimony of Eugene F. Bunker.)

The Witness: That's right.

The Court: The Rent Office never responded further?

The Witness: They never responded further.

The Court: That is all.

Redirect Examination

By Mr. Peterson:

Q. The Rent Office at Bozeman is now closed, is it not, Mr. Bunker?

A. It is now closed.

(Witness excused.)

Mr. Bunker: The defendant rests, your Honor.

Mr. Knowlton: The plaintiff has no rebuttal, your Honor.

The Court: Well, what is your pleasure with reference to [168] submitting proposed findings of fact and conclusions of law and memoranda supporting your proposed findings of fact and conclusions of law?

Mr. Peterson: We would suggest, if your Honor please, that the plaintiff submit such findings as he may have to offer and upon receipt of those, within a certain reasonable time, we be permitted to submit findings.

The Court: I think it would be better if you both separately and not wait for the other submit your own proposed findings of fact. In other words—will 15 days be sufficient for you?

Mr. Knowlton: It is satisfactory with me.

The Court: You submit the Court proposed findings of fact and conclusions of law and a memorandum argument supporting your proposed findings of fact and conclusions. After the service upon the opposing party of the proposed findings and memorandum, the opposing party may have 10 days within which to file a further memorandum and argument with the Court, but each side will, within 15 days serve and file their proposed findings of fact and conclusions in the case. Is that satisfactory.

Mr. Knowlton: That is satisfactory, your honor.

Mr. Peterson: That is satisfactory. [169]

United States of America,
State of Montana—ss.

I, John J. Parker, do hereby certify that I am the official Court Reporter in the above entitled court; that the foregoing transcript is a full, true and correct transcript of the proceedings had and the testimony taken in the cause of Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, plaintiff, vs. B. M. Crenshaw and Jane Doe Crenshaw, his wife, defendants, being Civil Cause No. 373 in the Helena Division of said Court, tried before the Honorable W. D. Murray, United States District Judge, sitting without a jury, at Butte, Montana, on the 26th, 27th and 28th days of September, 1949.

Dated this 11th day of April, 1950.

JOHN J. PARKER,

Official Court Reporter.

[Endorsed]: Filed April 15, 1950. [170]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable The United States Court of Appeals for the Ninth Circuit, that the foregoing two volumes consisting of 179 pages, numbered consecutively from 1 to 179 inclusive, constitute a full, true and correct transcript of all portions of the record in case No. 373, Tighe E. Woods, Housing Expediter, vs. B. M. Crimshaw, required to be incorporated therein by designation of the appellant, as the record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Eighteen and no/100 Dollars (\$18.00) and have been paid by the appellant.

Witness my hand and the seal of said court at Helena, Montana, this June 26, 1950.

[Seal] /s/ H. H. WALKER,
Clerk U. S. District Court,
District of Montana.

Endorsed: No. 12601. United States Court of Appeals for the Ninth Circuit. B. M. Crenshaw, Appellant, vs. Tighe E. Woods, Housing Expediter, Office of Housing Expediter, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed July 10, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

B. M. CRENSHAW, (Defendant),

Appellant,

vs.

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellee.

STATEMENT OF POINTS UPON WHICH AP-
PELLANT WILL RELY AND DESIGNA-
TION OF RECORD FOR CONSIDERA-
TION ON APPEAL

To the Clerk of the Above-Entitled Circuit Court
of Appeals and to the Attorney for the Office of
the Housing Expediter:

You will please take notice that B. M. Crenshaw,

the appellant in the above entitled action, will rely on the following points in the Appeal in the above entitled case, to-wit:

(1) That the Housing Expediter as an agency of the United States Government, created by Veterans' Emergency Act of 1946 as amended (50 U.S. C.A. App. Sec. 1821 et Seq.) as extended and amended by Public Law 422 and 464 of the 80th Congress, does not relate to the management of the war itself, and that the act violates and is repugnant to the due process clause of the 5th amendment of the Federal Constitution and by the orders permitted under the act, violates the right to contract and that the United States District Court lacks jurisdiction of the matters tried in the case

(2) The evidence in the case is insufficient to sustain the trial Court's findings and judgment therein in the following matters:

a. Improper computation of monies collected from tenants.

b. Failure of the Housing Expediter to notify Appellant of the rent to be changed for various apartments.

c. Inequity in refusing to change rents on certain apartments and in retaining the rates for rents for identical apartments, both with and without notice, to appellant.

(3) The Trial Court erred in finding Appellant (defendant) Crenshaw, as landlord, had received notice of rent orders establishing maximum [153]

rent in that there was no definite proof that any personnel of the Bozeman Rent Office or any other authorized persons having mailed notices of rent orders and of changes; that testimony of Appellant that notice of rent orders were to be sent to his attorney and denial by Crenshaw and his attorney that either of them had received any notices of the rent orders from the Bozeman Rent Office or any other rent office.

(4) Refusal of the Trial Court to recognize contract for extra services and extra equipment over and above those services and equipment provided for in the maximum rent orders.

That the record upon which this Appellant is taken is the record of pleadings and evidence, orders, rulings, and findings, certified and transmitted by the Clerk of the United States District Court for the District of Montana, and the exhibits used in the case and transmitted by order of the Judge of said Court.

/s/ E. F. BUNKER,

/s/ E. A. PETERSON,

Attorneys for Appellant.

[Endorsed]: Filed July 10, 1950.

No. 12601

IN THE
United States
Court Of Appeals
For the Ninth Circuit

B. M. CRENSHAW,

Appellant,

— vs. —

TIGHE E. WOODS, Housing Expediter,
Office of Housing Expediter,

Appellee.

Brief Of Appellant

Upon Appeal from the District Court of the United States
for the District of Montana.

EUGENE F. BUNKER,
ERNEST A. PETERSON,
Attorneys for Appellant,
Bozeman, Montana.

FILED



BOZEMAN CHRONICLE PRINT

OCT 16 1950

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No 12601

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

B. M. CRENSHAW,

Appellant,

— vs. —

TIGHE E. WOODS, Housing Expediter,

Office of Housing Expediter,

Appellee.

For The District of Montana.

Upon Appeal From The District Court of The United States



BOZEMAN CHRONICLE PRINT

Statement of Proceedings

Complaint.

The Complaint in this action is in the name of TIGHE E. WOODS, Housing Expediter, under Housing Rent Act of 1947 (50 U.S.C.A. App. Sec. 1881-1902 as extended and amended by Public Laws 422 & 464 of the 80th Congress). The Complaint alleges that jurisdiction is vested in the United States District Court of Montana under Section 206 (b) of the Act.

The Complaint sets forth that B. M. CRENSHAW and JANE DOE CRENSHAW (the action as to Jane Doe Crenshaw was alter dismissed and the only defendant is actually B. M. CRENSHAW); was the landlord and operator of a housing accommodation known as Crenshaw Apartments at 6 West Babcock, Bozeman, Montana, within the Bozeman defense-rental area. That it was the opinion of the Housing Expediter that appellant had violated the act by *receiving* and *collecting* from tenants occupying apartments in the accommodation and *collected rentals* (emphasis our own) in excess of the maximum legal rents fixed and established by law and had violated the Act by giving 30 day notice of evictions to certain tenants who refused to pay in excess of the maximum rent.

By reference there were then set forth sixteen violations detailed as shown in the Transcript at page 5, totaling \$2,087.50. The prayer was first for an injunction restraining the appellant from receiving or collecting rents in excess of the maximum legal rentals on any of the apartments and from evicting tenants who refused to pay in excess of the legal ceiling; second, for the

restoration and refund to tenants overcharged, and third, for costs (Tr. 5).

From the Complaint (Tr. 5) it should be noticed that there were thirteen tenants named occupying variously fourteen different apartments, some occupying two different apartments and one occupying three different apartments.

Answer.

The appellant's, B. M. Crenshaw's, Answer admitted that the Plaintiff brought the action and claimed jurisdiction as alleged in the Complaint. Appellant alleged that he operated only as agent for trustee to whom all control and rents were assigned (Tr. 6, 7, par. 2) and denied any violations as alleged in the Complaint, and demanded trial by jury. The trial by jury was denied on the grounds that this, by reason of the plea for relief by injunction, was an *equity* case.

STATEMENT OF THE CASE

At the beginning of the trial on motion of Attorney, Ernest A. Peterson, and agreement by C. E. Knowlton, Attorney for the appellee, motion for dismissal as to Jane Doe Crenshaw was granted (Tr. 28-29). Early in the trial a stipulation was entered into (Tr. 65) concerning the orders made by the rent director for apartments numbered 21, 20, 24, 36, 37 and 48, and that after the registration dates the different apartments were variously changed so as to permit up to \$65.00 and \$75.00 and then back to \$50.00 for apartment No. 20; that apartment No. 24 was changed from \$50.00 to \$65.00; that apartment No. 36 was changed from \$30.00 to \$40.00; that apartment No. 37 was changed from \$35.00 to

\$40.00 and that on the face of the records copies of the orders for such changes were placed in the United States mail.

It is the contention and testimony of the appellant and his attorney who was authorized to receive such notices, that none of them was ever received by either of them (Tr. 106, L. 11-24; Tr. 117 L. 11-15; Tr. 141 L. 6-13; Tr. 155 L. 1-12; L. 19-33). There was no testimony to the contrary.

That the appellant did have notice by having shown to him by tenants copies of notices of change, particularly on Apartment No. 24, 22, and 20; that all of the apartments were exactly alike except a few two-bedroom apartments (which apartments are not here in question) and that having notice of one apartment price change was to him tantamount to a change for all, since he did not receive any notices on any of the apartments from the Area Rent Director or Local Rent Director but only through tenants (Tr. 86, L. 7-13; Tr. 85 L. 9-15; Tr. 105 L. 13-33; Tr. 106 L. 1-29).

When a notice is mailed, there is a presumption of delivery, but in 66 C.J.S., p. 665, we find the following text:

“A notice duly mailed will be presumed to have been delivered, but this presumption is rebuttable, as discussed in Evidence, Sec. 136.”

Under the heading of Evidence in 31 C.J.S., p. 785, we find the rule applied that presumption of due receipt of a letter or other mail matter may be rebutted by evidence that it was not in fact received. (Renland vs. First Nat'l Bank, 4 P. 2d 488, 90 Mont. 424).

The testimony of appellant Crenshaw and his attorney denies that he ever received any of the rent orders.

According to some authorities, addressee's positive denial of receipt of mail matter renders the presumption of little weight (*Gibson vs. Rouse*, 142 P. 464, 81 Wash. 102).

Or may even entirely overcome the presumption especially if uncontradicted (*U. S. - Ripy vs. Cloverleaf Life & Casualty Co.*, C.C.A. Tex. 9 Fed. 2d 324).

And it has been held that such denial or other proof of non-receipt raises a presumption that the letter was never mailed.

Idaho - *Hobson vs. Security State Bank* 57 P 2d 685, 57 Ida. 601.

Mullock vs. Citizens Nat'l Bank of Salmon, 250 P. 648, 43 Ida. 214.

50 A.L.R. 1418

N. H. Wilson vs. Frankfort Marine Accident & Plate Glass, 91 A. 913, 77 N. H. 344

Okla - *Kneeling vs. Travelers* 67 P. 2d 944, 180 Okla. 99

Texas - Border State Life Ins. Co. vs. Noble, Civil App. 133 S. W. 2d 119.

In 30 Am. Jr. p. 247 Sec. 28 we find the rule set forth that where notice was properly mailed its receipt will be presumed in the absence of evidence to the contrary, and the deposit in a street letterbox or delivery to a mail carrier on duly is considered a proper mailing. This presumption may be overcome by evidence that the notice never was in fact received.

Bickerdike vs. Allen 157 Ill. 95, 41 N. E. 740, 29 L.R.A. 782

Casco Nat'l Bank vs. Shaw 79 Me. 376, 10 A. 67,
1 Am. St. Rep. 319

Huntley vs. Whittier, 105 Mass. 391, 7 Am. St.
Rep. 536

Vann vs. Marbury 100 Ala. 438, 14 So. 273, 23
L.R.A. 325, 46 Am. St. Rep. 70.

By Section 93-1301-7 (24) Revised Codes of Montana 1947, under what are denominated disputable presumptions, it is provided that a letter duly directed and mailed was received in the regular course of mail. By said statute it is declared that disputable presumptions are satisfactory if uncontradicted. We submit that a presumption of this kind, if contradicted, ceases to be satisfactory evidence and evidence which is not satisfactory by Section 93-301-13, Revised Codes of Montana, 1947, is slight evidence. Satisfactory evidence is required to establish a fact.

A search of the record in this case fails to disclose mailing of notices by any particular person. However, the record does show that it was the practice of the Bozeman Office to mail such notices. Therefore, it appears that the presumption that notices were mailed is entirely overcome by the testimony of the appellant Crenshaw who denied the notice of such rent orders.

The appellant further contends that he is entitled to any reasonable agreed amount for furnishing, at the tenants' special request, other and extra furniture or extra services such as storage or moving.

The appellant further contends that he should not be charged in the judgment where the tenant owes him rent in excess of the overcharge as appears in three instances (Tr. 93 L. 3 & 4; Tr. 94 L. 4; Tr. 101 L. 10; Tr. 104 L. 3 & 4); these show that Victor Barkley owes

\$100.00 and that R. C. Gregor owes \$105.00; and J. M. Ashmore owes \$385.00 all on rentals at that time.

The appellant also testified and it is not denied that he rented to Carl Jones by the week (Tr. 10 L. 21 & 22) and contends that rentals by the week are not under the rent controls, i.e. that only bi-monthly, monthly, and upward are under the rent control as they pertain to housing accommodations.

It is further the contention of the appellant that all of the apartments with the exception of apartments not here in question being equal, he was entitled to believe and did believe that the director of rent control would not, by his own order without request from the appellant, or notice to appellant, create a mis-comparability in such a case as this one where all apartments were known to him to be alike (Tr. 73 L. 25-31; Tr. 73 L. 32 & 33; Tr. 74 L. 1-18); in this connection it is the appellant's firm belief and contention that the area and local rent director have by their own acts so scrambled, without notice, the amounts chargeable for various identical apartments as to place this appellant in jeopardy, as in this case, and have treated their delegated (sic) authority to the disadvantage and danger of this appellant whether by intrigue, carelessness or misapplications of their powers, and that therefore, the appellant should not by those acts be penalized (see *Zajac v. McNulty* Misc. 1944, 51 N.Y. S. 2d 484, and *Kimmelman v. Tenenbaum* 1944, 50 N.Y. 2d 912, 182 Misc. 558).

The Act in its inception and under all of its amendments was enacted to prevent hardships to persons engaged in business as well as for tenants and others (Act

of January 30, 1942, see 26-56 Statute 23 Title 50 Sec. 901 U.S.C.A.).

He who seeks equity must do equity.

Royal Neighbors of America vs. Lowary 46 Fed (2d) 565

Dern vs. Tanner 60 Fed (2d) 626

EQUITY IS EQUALITY

State vs. Wibaux of Wibaur 281 Pac 341, 85 Mont. 532 American Surety Co. of New York vs. Mullen-dire 505, S. Ct. 239

The Complaint so far as amounts adjudged to be over-charges in this case are concerned, and the claims there-for and the judgment particularized as viewed by the appellant shows:

Tenant	Apt.	Com- plaint	Judg- ment		Over
John R. Durham	1	\$440.00	\$480.00		\$40.00
Victor B. Barkley	8	50.00	41.50	Note 1	
J. M. Ashmore	37 & 9	130.00	190.80	Note 2	60.80
M. C. Davis	12	80.00	70.00		
John Vallee	20, 21, 16	530.00	211.66		
R. H. Henke	17	150.00	135.00		
E. A. Willson	18	37.50	37.50		
Joseph D. O'Neill	20	125.00	112.50	Note 3	
Priscilla Larson	36	200.00	175.00		
Carl Jones	48	37.50	45.00	Note 4	7.50

The 'over' adds up to \$109.30, but from Note 1 it appears that Victor B. Barkley owes \$100.00 (Tr. 94 L. 4) and that he was complained of as occupying only two months at a claimed overcharge of \$25.00 per month, so that he has paid only \$50.00 or one month's rent and therefore the whole of the \$41.50 should be deducted; at Note 2 the Ashmore's apartments show claimed over-charges of \$130.00 and the amount due the appellant is

\$385.00 for fourteen months, and the overcharge is \$5.00 per month for eleven months and \$25.00 a month for three months, making a whole of \$190.80 which should be deducted; at Note 3 it should be noted that apartment No. 20 was set by the area director at \$75.00 and not \$50.00 as claimed, and the whole of \$112.50 should be deleted; at Note 4 it should be noted that this charge was by the week and is not under rent control and the whole \$45.00 should be deleted. The total of these deletions is \$430.60, which, to make an accurate computations, should be deducted from the \$1,728.96. In addition thereto there appears absolutely no reason, cause or right for the last entry in the list of the judgment "Treasurer of the United States \$230.00" and that should be deleted. The total judgment should not in any case exceed \$1,068.30. But the whole amount should be denied for the reason that every claimed overcharge was fully explained under the appellant's right to believe that he had a right to charge \$75.00 per month for all comparable apartments, and/or he had the right to charge the amounts that he testified that he charged plus the agreed addition for services, furniture or storage and the like, furnished at the request and instance of the tenant. There was no denial of any of these facts by any witness whomsoever. There was no showing whatsoever of actual delivery of notices to the appellant and the only testimony thereon is as stated above by the appellant and his attorney.

SPECIFICATIONS OF ERROR

1. That the Trial Court miscalculated the amounts claimed and judgment given by the Court as stated above.
2. That the Trial Court erred as to Carl Jones as being computed when not under the act.

3. That the Trial Court erred in not giving the appellant properly calculated credit for amounts unpaid to him as against the amounts claimed in the Complaint.

4. That the Trial Court has denied the appellant's right to charge the rentals set or presumed to be set, as the case may be, plus extra services and furniture voluntarily asked of him at the special request of the tenants at an agreed price therefor.

5. That the evidence is insufficient to sustain the Trial Court's findings of fact and judgment.

6. That the Trial Court erred in assuming and judging upon the premise that the appellant had received notices claimed but not proven to have been mailed when the evidence is direct and the proof undisputed that no notices were received by appellant or his attorney.

7. That the Court erred in not taking into consideration that the area rent director and the local rent director by their own acts confused and misled the appellant as to prices and were unfair to the appellant in changing rentals without notice and without regard to comparability or equity.

BRIEF STATEMENT OF ARGUMENT

The argument is self-evident from the statement of the case and the transcript and the contentions set forth above as to the appellant and the acts of the agents of the appellee. The rent control act in its inception was presumed and intended to prevent hardships not only to tenants but to those persons engaged in business which includes landlords. The act is a statutory derogation of the rights of individuals and particularly of landlords and should be construed most firmly against claimed viola-

tions of the act and looking to the end of justice and equity. It is the contention of the appellant that the whole story illicited in this trial is one of a studied or negligent course of conduct on the part of the office of Area or Local Rent Directors, the effect of which was to harass, mislead and get this appellant into difficulties and expense.

The area and local Rent Offices have, for some reason, only known to them, failed, neglected or refused to do equity and should not be permitted to seek redress for any apparent violation caused by their undisclosed orders. Upon its face, it is a flagrant misuse or abuse of delegated powers. The appellant respectfully contends the entire judgment should be reversed.

Respectfully submitted,

EUGENE F. BUNKER,

ERNEST A. PETERSON,

Attorneys for Appellant,

Bozeman, Montana.

No. 12601

**In the United States Court of Appeals
for the Ninth Circuit**

B. M. CRENSHAW, APPELLANT

v.

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLEE**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MONTANA**

BRIEF OF APPELLEE

ED DUPREE,

General Counsel,

LEON J. LIBEU,

Assistant General Counsel,

FRANCIS K. RILEY,

Special Litigation Attorney,

Office of the Housing Expediter, Washington 25, D. C.

FILED

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PAUL F. O'BRIEN,

CLERK

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In the United States Court of Appeals for the Ninth Circuit

No. 12601

B. M. CRENSHAW, APPELLANT

v.

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLEE**

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MONTANA*

BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, plaintiff below, recovered a judgment against the appellant, defendant below, in the United States District Court for the District of Montana, Helena Division, on February 21, 1950 (R. 17). The Expediter filed his Complaint on June 2, 1948 (R. 1). Answer was filed on July 7, 1948 (R. 6). The Expediter in his Complaint based jurisdiction of the Court below for an injunction and restitution

of rent overcharges, on Section 206 (b) of the Housing and Rent Act of 1947, as amended (50 U. S. C. A. 1881, et seq.) (R. 4).¹ Notice of Appeal was filed on April 21, 1950 (R. 20). Jurisdiction of this Court is invoked pursuant to Section 1291 of the Judicial Code (28 U. S. C. A. 1291).

STATEMENT OF THE CASE

The Expediter in his Complaint alleged that the defendant² was a landlord and operator of a certain housing accommodation located at 6 West Babcock in the City of Bozeman, Montana, and that he had violated the Act by serving tenants with 30-day notices of eviction contrary to the provisions of the Act (Par. 3, R. 3) and further violated the Act by collecting rents in excess of the legally established maxima (Par. 4, R. 4). The overcharges were set forth in

¹ Since part of the restitution ordered by the Court below was for overcharges prior to July 1, 1947 (R. 5, 20), the statutory authority for such order must have been Section 205 (a) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 925 (a)). The question was never raised in the court below but this Court may take judicial notice of the existence of the Act of 1942 and of Section 1 (b), *infra*, p. 8, and Section 205 (a), *infra*, p. 36.

² Jane Doe Crenshaw was also named as a party defendant but was dismissed by stipulation of the parties (R. 28).

detail in Schedule A which was made part of the plaintiff's Complaint.³

The defendant's Answer consisted of a general denial (Par. 3, R. 7) and a plea that the defendant

³ Schedule A reads as follows:

Grenshaw Apartments, 6 West Babcock, Bozeman, Mont.

Name of tenant	Apartment	Period of occupancy	MLR	Amount charged	Amount over-charged per month	Total over-charged
Maj. L. W. Konecki.....	14	Nov. 1/47 to and incl. June 1/48.	\$45	\$75	\$30 for 8 mo....	\$240
Mrs. J. M. Ashmore.....	37	Apr. 6/47 to Mar. 6/48....	50	55	\$5 for 11 mo....	55
Mrs. J. M. Ashmore.....	9	Mar. 6/48 to and incl. June 1/48.	50	75	\$25 for 3 mo....	75
Mrs. John R. Durham....	1	Sept. 1/47 to Mar. 1/48....	50	100	\$50 for 6 mo....	300
Mrs. John R. Durham....	1	Mar. 1/48 to June 1/48 incl.	50	85	\$35 for 4 mo....	140
Leona Reeves, Clarice Reeves, and Louise Ketter.	24	Apr. 1/48 to and incl. June 1948.	65	75	\$10 for 3 mo....	30
R. H. Henke.....	17	Sept. 1/47 to and incl. June 1/47.	40	55	\$15 for 10 mo....	150
Victor B. Barkley.....	8	Apr. 8/48 to June 1/48....	50	75	\$25 for 2 mo....	50
Joseph D. O'Neill.....	20	Jan. 15/48 to June 1/48....	50	75	\$25 for 5 mo....	125
Mr. and Mrs. John Vallee.	20	June 8/46 to Nov. 28/46...	50	75	\$25 for 5 mo....	125
Mr. and Mrs. John Vallee.	21	Nov. 29/46 to Aug. 20/47...	50	75	\$25 for 9 mo....	225
Mr. and Mrs. John Vallee.	16	Aug. 20/47 to June 1/48....	55	*75	\$20 for 9 mo....	180
Mr. and Mrs. R. C. Gregar.	21	Mar. 5/48 to June 1/48....	50	75	\$25 for 3 mo....	75
Mr. and Mrs. E. A. Wilson.	18	Apr. 15/48 to June 1/48...	50	75	\$25 for 1½ mo.	37.50
Mr. and Mrs. Carl Jones.	48	Apr. 10/48 to June 1/48...	15	11.25 wk.	\$7.50 per wk. for 5 wks.	37.50
Priscilla Larson.....	36	Nov. 1/47 to June 1/48....	40	65 per mo.	\$25 for 8 mo....	200.00
Mr. and Mrs. M. C. Davies.	12	Nov. 1/47 to June 1/48....	65	75	\$10 for 8 mo....	80.00

*Except March, paid \$55.

was merely an agent "for the Mortgagor and its assigns; * * *" (Par. 2, R. 6).⁴

The appellants demanded a jury trial (Par. 4, R. 7). The record is silent as to the disposition of this Motion, but it must be assumed that it was denied since the case was tried by the Court (Honorable W. D. Murray (D. J.) presiding), without a jury (R. 8).

The trial consisted of the Area Rent Director testifying for the plaintiff as to the maximum rents (R. 34). The defendant admitted the overcharges, but, justified them on the ground that additional services were rendered (R. 89) as more fully set out hereinafter (p. 14 and p. 15). The third witness was one of the defendant's attorneys who testified that no notice was ever received by him, as defendant's agent, prior to the issuance of the orders establishing the maximum rent (R. 154).

The Area Rent Director testified that the rent on Apartment No. 1 was registered at \$35.00 per month (R. 37, 38). The maximum rents on the remaining apartments were established by orders dated not later than June 26, 1947.⁵ He further testified that he

⁴ This defense has not been pursued in this appeal and must therefore, be considered as abandoned (*Leitner v. United States*, 184 F.2d 216 (C. A. 9).

⁵ See the following table:

Apartment	Record	Apartment	Record
8.....	Page 43	18.....	Page 63
9.....	" 47	20.....	" 65
12.....	" 49	21.....	" 65
14.....	" 53	24.....	" 65
16.....	" 56	36.....	" 66
17.....	" 61	37.....	" 66
		38.....	" 66

mailed several orders registered mail, because he had "sent out a proposal of what I was going to do and I didn't get any reply, so I wanted to be sure they were delivered" (R. 69). The letter and the orders were returned unclaimed (R. 70). On cross-examination the Area Rent Director testified that although he received petitions for rent increases based upon the apartment being furnished, preliminary inspection showed they had not in fact been furnished (R. 78). Subsequent investigations were impossible because of threats of bodily violence made by defendant and his attorney (R. 78, 81), which were admitted (R. 132). The Area Rent Director concluded with testimony that the orders showed on their faces that they had been mailed in the usual course of business (R. 86, 87).

The plaintiff called the defendant pursuant to Rule 43 (b) of the Federal Rules of Civil Procedure (28 U. S. C. A. foll. 723 (c)). The defendant testified that although he collected more than the legal maximum rent, he also furnished extra services, which were reasonably worth the added charge (for detailed examination of the foregoing, see *infra*, p. 14 to p. 15).

On cross-examination he stated that he had "received notices through tenants that those prices [\$65 and \$75] were the prices for the like or same apartments" (R. 105). Therefore, notice that Apartment 24 had been set at \$65 per month, led him to believe that all the apartments, "except the three \$55's" had been set at \$65 (R. 105).⁶ He further testified that

⁶ The record shows that even if the appellant had believed Apartment 24 and those of like kind, had a maximum rent of \$65, he

he was simply the rent collector for "Mr. Charles Bell, who was trustee for the RFC" (R. 107).⁷ The balance of his testimony was to the effect that extra services were furnished for the additional rents (R. 123) or that some of the tenants owed him more money than he overcharged (R. 111-117).

At the conclusion of the trial, the Court entered Findings of Fact and Conclusions of Law (R. 8-17). The Court found that there were overcharges on fourteen apartments (Nos. 3 to 30) (R. 8-13).⁸ As Conclusions of Law, the Court found that the Expediter was entitled to maintain the action pursuant to Sec-

still violated the ceiling on that and the others (R. 105), by admittedly collecting \$75 per month for "extra services." Further, he saw the orders on Apartments 12 and 20 (R. 110), which had different maximum rents (Compare Apartments 20 and 24, R. 65-66). In addition, the defendant admitted that he knew separate orders were issued for each apartment (R. 147).

⁷ As stated above, no appeal has been taken raising the question of agency. In any event, it would have been unfounded since the collector of the rent is liable under the Act. (*Woods v. Bobbitt*, 165 F. 2d 673 (C. A. 4); *Woods v. Willis*, 171 F. 2d 289 (C. A. 5)); *Bowles v. Ruppel*, 157 F. 2d 944 (C. A. 3d.) Furthermore, under direct interrogation by the Court, the appellant admitted that he ran the apartment, he considered it his apartment and that it was his apartment (R. 124).

⁸ The Court found overcharges on all of the apartments listed in Schedule A but refused to order restitution to Konecki, Reeves, and Ketter, and Gregar, "tenants whom the Court has found not entitled in equity and good conscience to receive restitution" (R. 18). In lieu thereof, the Court ordered the excess collections to be remitted to the Treasurer of the United States (R. 18).

tion 206 (b) of the Act (No. 1, 2; R. 13, 14) and that restitution should be made to the tenants except Konecki and Reeves (Nos. 7 and 13; R. 14, 16).

On the basis of the foregoing Findings and Conclusions, the Court entered judgment against the defendant in the sum of \$1,728.96 and issued an injunction restraining further violations of the Act and regulations (R. 17-19). From that judgment, the defendant appeals (R. 20).

ARGUMENT

I

Neither the Court below nor this Court has jurisdiction to consider the validity of the orders establishing the maximum rent

a. The defendant-appellant in the Court below placed the gravamen of his defense on the ground that the orders purportedly establishing the maximum rent were invalid for failure of the Area Rent Director to give notice prior to issuing them (e. g., R. 85, 157). In this Court his principal basis for error is again the alleged failure of due process (Br. 4-6). All of the orders establishing the maximum rents were issued not later than June 26, 1947 (R. 65). They were, therefore, issued pursuant to the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 901 et seq.). Since this is an enforcement action, the provisions of the Price Control Act are still in ex-

istence, especially Sections 203 and 204 thereof.⁹ 150 *E. 47th Corp. v. Porter*, 156 F. 2d 541, 544 (E. C. A.); *Standard Kosher Poultry Co. v. Clark*, 163 F. 2d 430 (E. C. A.); *Woods v. Richman*, 174 F. 2d 614 (C. A. 9th); *Woods v. Gochmour*, 177 F. 2d 964 (C. A. 9th). Consequently, the Court below and this Court do not have jurisdiction to consider the validity of the orders. *Woods v. Hills*, 334 U. S. 210; *Brooks v. Woods*, 181 F. 2d 716, 718 (C. A. 9th); *Woods v. Kaye*, 175 F. 2d 886, 888 (C. A. 9th). This Court from the earliest days of price control has held that exclusive jurisdiction to determine the validity of an order lies in the Emergency Court of Appeals, even though the attack is that the order is void on its face. *Rosensweig v. United States*, 144 F. 2d 30 (C. A. 9th); *Martini v. Porter*, 157 F. 2d 35 (C. A. 9th), cert. denied 330 U. S. 848. This is also true in cases where the claim

⁹ Sections 203 (a), 204 (a) and (e) the sections concerned with administrative appeals and judicial review are set forth in full, *infra*, pp. 33-35.

Section 1 (b) of said Act provides as follows:

"Section 1. * * *

"(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

is that the order is void *ab initio* for want of procedural due process. *Woods v. Bobbitt*, 165 F. 2d 673 (C. A. 4th).

In *Woods v. Bobbitt*, *supra*, the question of lack of notice was directly before the Court. No affidavit of the mailing of the order was made or placed in the file of the Rent Director's office as was required by Rev. Rent Procedural Regulation No. 3 (8 F. R. 14811, amended 9 F. R. 10484, 11 F. R. 14281) which Procedural Regulation was in force and effect at the time the order was issued in this present appeal. The trial court was of the opinion that the order reducing the rent was void since the Rent Director did not proceed in strict accordance with the Procedural Regulation and, therefore, held that under such circumstances it had jurisdiction to consider the validity of the order, and that the exclusive jurisdiction of Section 204 (d) did not attach. On appeal, the Fourth Circuit reversed, holding that Section 204 (d) applies even where the claim is made that the person has been denied due process, or that the order is void *ab initio*. The Court said (165 F. 2d at p. 675):

It is firmly established that the United States courts have no power to consider the validity of a rent reduction order but that exclusive jurisdiction in respects thereto resides in the Emergency Court of Appeals and the Supreme Court of the United States; and this is true even though the claim is made that the person has been denied due process or that the order is void *ab initio*.

Another case closely in point is *Woods v. Hills*, 168 F. 2d 995, after remand from the Supreme Court (see 334 U. S. 210). There, Hills raised a similar contention in his brief before the Court in the following language:

We deny that the defendant ever received any notice like Exhibit 4 D,¹⁰ and the court asked the counsel if he had such a notice for the northeast second floor apartment and none was produced.

The lower Court had entered judgment for Hills, holding that the burden was on the Administrator to establish the validity of the second order, and that he had failed to introduce proof establishing its validity. The Court of Appeals reversed after certifying questions to the Supreme Court (334 U. S. 210) on the ground that “the District Court was and is without jurisdiction to determine the validity of the second rent order * * *.”

Accord, *Roupp v. Woods*, 176 F. 2d 544 (C. A. 10th).

In *Woods v. Kaye*, *supra*, the appellant, defendant below, had successfully challenged a retroactive order in the District Court, on the ground that she had properly registered within 30 days of first renting. The Area Rent Office had issued an order retroactively and ordered refund. In reversing the lower court this Court said, at p. 889:

* * * The failure of the landlord to properly follow the procedure of review provided,

¹⁰ This was a notice of intention to reduce rentals.

results in a bar to contesting the enforcement action in the District Court. If this were not so, the purpose of Congress in providing the method of protest and in placing sole jurisdiction in the Emergency Court in order to facilitate and expedite its rent policy, would be manifestly weakened. It is our conclusion that the District Court does not have jurisdiction to inquire into that which could have and should have been appealed to the Emergency Court of Appeals.

Thus, it is abundantly clear that the unsuccessful attack upon the orders in the lower court in the instant case, should be affirmed.

b. Without in any way conceding that the foregoing is not applicable to the case at bar, it is appropriate to inform this Court as to the contents of the record on the question of notice. The record shows that some orders had been mailed out registered mail to the appellant (R. 68) but that the envelope and its contents were returned to the Area Office unclaimed (Plaintiff's Exhibit 10-R. 70). Furthermore, the defendant admitted under examination by his own counsel that he had seen the orders on Apartments 12, 20 and 24 but that he made no inquiry as to the existence of any other orders (R. 110). He told the Court that he knew that separate orders were issued for each apartment (R. 147). In addition, the Court below was convinced that he had full notice of the issuance of the orders.

The COURT. It is a matter of inference, surely, but the Court is not supposed to be

blind and dumb. I am supposed to find out all the facts of this case. Now, he has testified he did know about the orders. He knew there were orders; he knew that the Rent Director issued orders, and he knew that the tenants got copies of the orders. Now, he says that—and your contention is that—having heard and seen the order in one case, he just proceeded in the same way with reference to the other apartments because he thought they must be all the same. That is a question for the Court to consider, whether that is reasonable or not, or whether it would be more reasonable for him, knowing there were other orders, knowing each apartment was handled separately, to inquire as to the other orders (R. 121–122).

In view of the above record of the trial, it cannot be said the judgment rendered by the Court below was not based upon substantial evidence. The judgment therefore should be affirmed. Rule 52 (a) of the Federal Rules of Civil Procedure (28 U. S. C. A., foll. 723 (c); *Roos v. Woods*, 170 F. 2d 1023 (C. A. 9).

II

The findings of the Court below are supported by substantial evidence; they are not clearly erroneous, and, therefore, should not be disturbed

The Court below entered Findings of Fact (R. 8), covering each apartment, the name of the tenant occupying, the period occupied, the amount of rent collected, and the maximum rent of each (Nos. 3 to 30, R. 9–13). These Findings, as shown hereinafter are supported by substantial evidence, and since they

are not clearly erroneous, should be affirmed. Rule 52 (a) of the Federal Rules of Civil Procedure (28 U. S. C. A. foll. 723 (c)).

That rule provides in part:

* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

In applying the above rule this Court has repeatedly held that where a finding is not clearly erroneous it is "obliged to accept it" (*Coffin-Redington Co. v. Porter*, 156 F. 2d 113 (C. A. 9); *Columbian National Life Insurance Co. v. A. Quandt & Sons*, 154 F. 2d 1006 (C. A. 9th); *Wingate v. Bercut*, 146 F. 2d 725 (C. A. 9th); *Goldstein v. Polakof*, 135 F. 2d 45 (C. A. 9th); *Cherry-Burrell Co. v. Thatcher*, 107 F. 2d 65 (C. A. 9th); *Lumberman's Mutual Casualty Co. v. McIver*, 110 F. 2d 323 (C. A. 9th)).

In the *Coffin-Redington* case, *supra*, this Court after viewing the entire Record sustained the finding of the trial court that the defendants violated the Emergency Price Control Act by a tie-in sale of liquors, stating at p. 114:

The trial court observed their conduct and demeanor while on the stand, and was in better position than we to appraise the situation and to draw inferences. We are not able to say that the finding in question was clearly erroneous and are therefore obliged to accept it. *Columbian National Life Ins. Co. v. A. Quandt & Sons*, 9 Cir., 154 F. 2d 1006.

Here, the plaintiff called the defendant as part of his case in chief (R. 89), who testified concerning his rent operations, as follows:

1. As to Apartment No. 1, Mrs. John Durham occupied it from September 1, 1947, to June 1, 1948 (R. 90), and paid "\$50 every two weeks," for awhile, and then collected "\$42.50 every two weeks" (R. 91).¹¹

2. As to Apartment No. 8, he admitted he collected \$75 per month while Victor B. Barkley occupied it (R. 93).¹²

3. As to Apartment No. 9, Mrs. J. M. Ashmore admittedly occupied it from March 6, 1948, to June 1, 1948, and defendant charged her \$75 per month. "I had to put a baby crib in there" (R. 95).

4. As to Apartment No. 12, he admitted renting to Mr. and Mrs. M. C. Davies from June 1, 1947, to June 1, 1948 (R. 95), and charged them \$75 per month (R. 96).

5. As to Apartment No. 14, he admitted Major L. W. Konecki occupied it from November 1, 1947, to June 1, 1948, and that he collected \$75 per month for that period (R. 96).

6. As to Apartment No. 16, he admitted Mr. and Mrs. John Vallee occupied it from August 20, 1947, to June 1, 1948, and collected \$75 for the term, except for the month of March (R. 97).

¹¹ The defendant denied in his answers to the requests for admissions that he collected \$100 per month and \$85 per month. He admitted on the stand, however, that the denial was based upon a bimonthly collection of half those amounts (R. 92).

¹² His denial of collecting \$75 per month in his answer to requests for admissions was not to the amount, but to the fact that part was rent and part was for "extra service" (R. 93).

7. As to Apartment 17, R. H. Henke admittedly occupied it from September 1, 1947, to June 1, 1948, and paid \$55 per month for the entire term (R. 98).

8. As to Apartment 18, he admitted Mr. and Mrs. E. A. Wilson occupied it from April 15, 1948, to June 1, 1948, and paid \$75 per month (R. 99).

9. As to Apartment 20, admittedly Joseph D. O'Neill occupied it from January 15, 1948, to June 1, 1948 (R. 99), and the defendant collected \$75 per month (R. 100)¹³

10. As to Apartment 21, he admitted that Mr. and Mrs. John Vallee occupied it from November 1946 to August 20, 1947, and collected \$75, but "Some of that charge was for the extra bed" (R. 100).

11. As to Apartment 24, there was admittedly an overcharge of \$30 (R. 102), but the Court refused to order restitution, as against "equity and good conscience" (R. 18).

12. As to Apartment 36, he admitted Priscilla Larson occupied it from November 1, 1947, to June 1, 1948. (R. 103).

13. As to Apartment 37, admittedly Mrs. J. M. Ashmore occupied it from April 6, 1947, to March 6, 1948 (R. 103), and collected \$55 per month (R. 104).

14. As to Apartment 48, he admitted Mr. and Mrs.

¹³ In his brief, appellant claims that the rent had been set by order at \$75.00 per month (Br. 9). This is partially true, but immaterial to the order of restitution of \$112.50 (R. 18). The parties stipulated that the official records of the Area Office would show that "on June 26, 1947, the rent director made an order reducing the rent from \$75 to \$50 per month furnished" (R. 65). The defendant admitted O'Neill paid \$75 a month for four and a half months, or \$112.50 over the ceiling.

Carl Jones occupied it from April 10, 1948, to June 1, 1948 (R. 104), and collected \$11.25 per week (R. 104). All of the foregoing overcharges were by defendant's own admission, knowingly and deliberately made (R. 105).

Thus, the record is unequivocal that the defendant collected more than the legal maximum rent from the tenants in question. But, even assuming, arguendo, that a conflict of evidence did exist in the record, the Court below had the opportunity to observe the witnesses, and weigh each one's statements upon the basis of all factors before it, so due weight must be given to the findings based upon those factors.

This Court stated the rule to be as follows, in *Columbia National Life Insurance Company v. A. Quandt & Sons*, 154 F. 2d 1006:

Where there is a conflict in the evidence, this court must keep in mind that the trial judge who hears and sees the witnesses has a better opportunity to appraise their credibility and judge the weight to be attached to their testimony. We cannot say that the finding of the lower court was clearly erroneous. It is the rule that the findings of the trial court are to be accepted on appeal unless clearly wrong.

In view of the foregoing, it cannot be seriously contended that the defendant was ignorant of the matters pertaining to the operation of his apartment building with regard to the establishment of maximum rents, and, the district court was fully justify in finding that he had violated the Act and Regulation. Consequently, the judgment should be affirmed.

III

Consideration of appellant's arguments

The appellant has raised several issues to which a brief answer should suffice. These matters are answered in the order in which they occur in appellant's brief, and not in the order of his Specifications of Error, to which reference will be made. The contentions are:

1. The appellant maintains that he is entitled to "any reasonable agreed amount" for extra services or furnishings, "at the tenant's special request" (Br. 6; Spec. of Error 4, Br. 10).

2. The appellant should not be held liable for restitution of rent overcharges to a tenant who owes him money (Br. 6; Spec. of Error 3, Br. 10).

3. The Court below erred in not applying equitable maxims¹¹ and thus entering judgment for the defendant (Br. 8). (This was not a Specification of Error.)

4. Apartment 48 was rented on a weekly basis "and is not under rent control," therefore, that portion of the judgment should be reversed (Br. 8-9; Spec. of Error 2, Br. 9).

5. The trial court erred as a matter of arithmetic (Br. 8; Spec. of Error 1, Br. 9).

6. The order of payment to the Treasurer of the United States was unauthorized (Br. 9, not specified as error).

These contentions will be discussed in order.

¹¹"He who seeks equity must do equity." And, "Equity is equality."

1. *Appellant is not entitled to a reasonable amount for extra services.*

The appellant claims error in entering the judgment on the ground "that every claimed overcharge was fully explained under the appellant's right to believe that he had a right * * * to charge the amount he testified he charged plus the agreed addition for services, furniture, storage, and the like, furnished at the request and instance of the tenant" (Br. 9). He placed strong reliance in his testimony on the kind of services furnished (e. g., R. 95). But his attitude toward the problem of complying with the law on rent increases is best expressed in his own words (R. 125-27):

Q. Did you change any rents after you were up to see Mr. Bunker?

A. I change them every day.

Q. You change them every day without regard to what they might be down at the Office of the Housing Expediter.

Mr. BUNKER. Objected to.

The COURT. Overruled. Answer the question. Do you change the rents whenever you feel like it?

The WITNESS. Yes.

The COURT. Without regard to the Rent Control Office?

The WITNESS. They wouldn't give me any cooperation.

The COURT. Do you change your rents without any consideration of what the Rent Director might do?

The WITNESS. I take his \$65.

The COURT. And charge whatever you want to?

The WITNESS. No; not whatever I want to. If I charged what I wanted to, it would be \$100 to break even on the investment.

The COURT. Do you fix the rents without regard to what the Rent Director fixes them at?

The WITNESS. No, sir. He fixed them at \$65. I figure I have the right according to law to charge 15% more.

The COURT. Fifteen percent more than the Rent Director fixed?

The WITNESS. That is one reason.

The COURT. You think you have the right to charge 15% more than what the Rent Director fixes?

The WITNESS. Yes.

The COURT. What is the other reason?

The WITNESS. Service.

The COURT. Any other reasons?

The WITNESS. Furniture and service.

The COURT. Furniture and service and you have the right to charge 15% more than the rent director fixes the rent at?

The WITNESS. Yes, sir.

Q. (By Mr. KNOWLTON.) You never entered into any leases in connection with the apartments?

A. No leases on the apartments."¹⁵

It is obvious that such a defiant approach quickly and easily nullifies effective rent control. However, the Act, the regulations, and the reported decisions

¹⁵ The 1947 Act and its 1948 amendment permitted collection of 115% of the legal maximum rent, if a voluntary written lease was entered into specifying certain conditions. There is no evidence that any such leases were offered to the tenants, or entered into.

are decidedly opposed to such an attitude. Section 206 (a) of the Act¹⁶ forbids the collection of rent in excess of the maximum established by it, or any regulation,¹⁷ or order, of the Expediter. In addition, the regulation specifically authorizes a landlord to obtain rent increases in an orderly, legal manner with the prior approval of the Expediter. Concomitantly, it provides an effective measure of protection to the tenant from unjustified and unnecessarily burdensome increases.¹⁸ The wisdom of this provision has been recognized and applied by several Courts of Appeal.

¹⁶ That section reads as follows:

“SEC. 206 (a). It shall be unlawful for any person to demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under Section 204, or otherwise to do or omit to do any act, in violation of this Act, or of any regulation or order or requirement under this Act, or to offer, solicit, attempt, or agree to do any of the foregoing.”

¹⁷ Section 2 (a) of the Regulation provides:

“(a) *General prohibition.* Regardless of any contract, agreement, or lease, or other obligation heretofore or hereafter entered into, no person shall offer, demand or receive any rent for or in connection with the use or occupancy on and after the effective date of §§ 825.1 to 825.12, inclusive, of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by §§ 825.1 to 825.12, inclusive; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. A reduction in the services, furniture, furnishings, or equipment required under § 825.3 shall constitute an acceptance of rent higher than the maximum rent. Lower rents than those provided by §§ 825.1 to 825.12, inclusive, may be demanded or received.”

¹⁸ Section 5 (a) (3) of the Regulation says:

“(a) *Grounds for increase of maximum rent.* Any landlord may file a petition for adjustment to increase the maximum rent otherwise allowable only on the grounds that: * * *

“(3) *Substantial increase in space, services, furniture, furnishings or equipment.* There has been a substantial increase in the

In *Creedon v. Olinger*, 170 F. 2d 895 (C. A. 5th), the District Court denied recovery for overcharges "for the reason that refrigerators had been furnished by some of the tenants, air-conditioning had been made possible by the defendant to others, and at times during the period in question relatives and friends had visited certain of the tenants and during the visit occupied apartments with them" (id. p. 879). The District court held that:

"It is the business of the courts to try to discover the just way and from an impartial attitude to see where the right is." (id.)

In reversing that decision the Court of Appeals held that the landlord's relief was in the administrative procedure provided, and not in the courts. The Court then concluded:

Since the undisputed evidence clearly discloses overcharges during the period alleged in the complaint, judgment for at least the amount of the overcharges must be granted in

services, furniture, furnishings, or equipment provided with the housing accommodations since the date or order determining its maximum rent or a substantial increase in the living space since June 30, 1947, but before April 1, 1948. No increase in the maximum rent shall be ordered on the ground set forth in this paragraph (a) (3) unless the increase in living space, services, furniture, furnishings or equipment occurred with the consent of the tenant or while the accommodations were vacant: *Provided*, That an adjustment may be ordered, although the tenant refuses to consent to the increase in living space, services, furniture, furnishings or equipment, if the Expediter finds that such increase (i) is reasonably required for the operation of a multiple dwelling structure or other structure of which the accommodations are a part or (ii) is necessary for the preservation or maintenance of the accommodations."

favor of the Expediter or, by way of restitution, to the tenant. (id.)

A more exaggerated case came before the Court of Appeals for the First Circuit in *Elma Realty Co. v. Woods*, 169 F. 2d 172. There the appellant's building was burned in part, rendering it unfit for human habitation. The Area Rent Director reduced the rent to \$1.00 per week "due to substantial deterioration," but informed the appellant that it would increase the rent when made habitable again. On June 6, 1947, after rehabilitation of the premises, the rents were adjusted upward. However, the appellant had been collecting increased rent from the previous April without authorization. This collection constituted the overcharge. In upholding the trial court's judgment of restitution and double damages, the Court said, at p. 174:

* * * Thus, although the appellant was undoubtedly entitled to an upward adjustment of its maximum rents after its apartments were again habitable, nevertheless, the regulations do not permit it to increase its rents until after it has applied for and obtained permission to do so. *Thierry v. Gilbert*, 1 Cir., 147 F. 2d 603.

In an analogous case a prior decision of this Court supports the reasoning of the foregoing cases. The appellant, in *Fontes v. Porter*, 156 F. 2d 956 (C. A. 9th) sold a rebuilt lathe with an oral guarantee, at a maximum price established for a used lathe with a written guarantee. After the sale he repaired it within the terms of the guarantee. Nevertheless, action was brought against him for damages for the

difference in price between used machine tools with and without a written guarantee. The District Court entered a judgment for damages for the violation. In this Court, the appellant argued that he did in fact comply with the regulation, and, therefore, the spirit rather than the letter of the regulation should apply. In affirming the judgment, the Court, speaking through Judge Healy, said, at p. 958:

* * * Neither of these requirements was met by appellant. In the absence of compliance he was not entitled to take advantage of the price permitted for rebuilt and guaranteed tools. A holding otherwise would encourage equivocation and evasion.

The principle in issue here is more extreme in that the appellant not only did not comply with the regulation in spirit, but violated it in the letter. Consequently, the judgment should be affirmed.

2. The court below properly refused to give effect to counterclaims asserted by appellant at the time of trial.

(a) In his brief appellant claims error in that the Court below ordered restitution of \$41.50 to Victor B. Barkley, who is alleged to owe \$100.00 (Br. 8);¹⁹ and, that the order of restitution of \$190.80 to J. M. Ashmore is error because “the amount due the appellant is \$385.00 for fourteen months * * *” (Br. 8-9). The claims asserted here are bald statements of indebtedness unsupported in fact, and ob-

¹⁹ The actual language of the brief says that “* * * from note 1 it appears that Victor B. Barkley owes \$100.00 * * *.” Note 1 (Br. 8) does not indicate nor prove that anyone owes anything to anyone else.

viously not believed by the Court below. With reference to the former claim of \$100 the Court expressed disbelief.

The COURT. He did pay \$75 a month as rent for the apartment? [90.]

The WITNESS. He owes me \$100 yet, your Honor.

The COURT. You charged him \$75 a month for the apartment?

The WITNESS. Yes; with extra service.

The COURT. I don't see why we want to quibble about these things. The court is here to do justice. Let's not quibble about it, let's get down to business and tell the truth right from the start. * * * (R. 94.)

Admitting to collection of excess rentals from the tenant Ashmore, the appellant said, "I must have collected about half of it. She owes me \$385 now" (R. 104). However, since his answer did not plead the indebtedness and since he offered no proof, the Court below cannot be said to have erred in rejecting that gratuitous statement.

(b) The appellant's failure to obtain relief against the two tenants who allegedly owed him money was evidently the direct result of his own negligence. The record is silent that the appellant made any attempt in any stage of the action in the Court below to bring the tenants in as third parties-defendants for the purpose of asserting any counterclaim against them. The appellant could have made the tenants, Barkley and Ashmore, parties and permitted the Court to dispose of all claims arising out of this action. The Federal Rules of Civil Procedure provide

the means of extending the Court's jurisdiction to the appellant's claims against the tenants in circumstances such as these (Rules 13 (h), 14 (a), and 19 (b), 28 U. S. C. A., foll. 723 (c)).²⁰

In a case previously decided, a similar claim was made and was dismissed by the Court of Appeals for the Fifth Circuit on the ground that if the defendants fail to avail themselves of the provisions of the Federal Rules of Civil Procedure in the District Court they are estopped in the Court of Appeals from claiming injury by reason of such failure. In *Coefficient Foundation v. Woods*, 171 F. 2d 691, the Court said at pages 694-695:

This action for restitution was brought under 205 (a) and being an equitable proceeding [citations], the trial court, in the exercise of its equity powers, could have required the tenants to be made parties upon the timely request of one of the parties or sua sponte. Defendants filed no counterclaim seeking either an outright recovery or an offset against the tenants and took no steps under Rules 13 and 14, F. R. C. P., to bring the tenants in as parties, or to have them brought, but instead sought to defeat the action on the ground of the absence of the tenants as parties.

Counterclaim, set-off, recoupment, and the like are in the nature of affirmative remedies which the defendant has the burden of pleading and proving, and the trial Court will not be put in error for appellants' own omissions, or for failing to do that which they did not timely request. It is true that the trial Court may, of

²⁰ These sections are set forth in full, *infra*, p. 38.

its own motion, bring in the tenants if it deems same necessary to do complete justice under Section 205 (a). See *Porter v. Warner Holding Company*, 328 U. S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332; *Woods v. Selber*, 5 Cir., 171 F. 2d 900; Rule 13 (h), F. R. C. P. But in the absence of the filing of a counterclaim or offset, or the laying of some other appropriate predicate, and in the absence of a timely motion or request to the trial Court by the defendants to bring the tenants in, the Court will not be put in error for failing to anticipate that during the course of the trial the defendants might undertake to show that some of the tenants were indebted to one or the other of them."

See, too, *Woods v. McCoy*, 177 F. 2d 355, 356 (C. A. 4th).

Any injury, therefore, that the appellant may have suffered by reason of his failure to assert his counterclaim is the result of his own negligence.

3. *There is no merit in the contention that the Court below failed to apply equitable maxims.*

In his brief the appellant cites two equitable maxims (Br. 8) evidently in support of his contention that the judgment of the Court below was in error.

It should be noted that the right of the United States and its agencies to an injunction provided by statute stands on a footing different from the rights of private parties to an injunction. In such case as was said in *Hecht Company v. Bowles*, 321 U. S. 321 " * * * the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief." The statutory

injunction, unlike the injunction granted to protect private interests, is to carry out congressional policy and vindicate public rights. Commonly it is furnished where equitable jurisprudence would not necessarily have afforded relief (cf. *American Fruit Growers v. United States*, 105 F. 2d 722, 725 (C. C. A. 9th, 1939); *Securities and Exchange Commission v. Jones*, 85 F. 2d 17 (C. C. A. 2d, 1936) cert. denied 299 U. S. 581; *United States v. Adler's Creamery Company*, 110 F. 2d 482 (C. C. A. 2d, 1940) cert. denied 311 U. S. 657). The statutory injunction, in other words, "does not call for a balance of equities or for the invocation of generalities of judicial maxims" in order to determine whether an injunction should issue (*United States v. San Francisco*, 310 U. S. 16, 30). The Supreme Court in the *San Francisco* case then concluded that, as here, a declared policy of Congress cannot be nullified by the citation of equitable maxims.

* * * The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective. Injunction to prohibit continued use—in violation of that policy—of property granted by the United States, and to enforce the grantee's covenants, is both appropriate and necessary. (310 U. S. at p. 31.)

4. *The contention that premises rented on a weekly basis are exempt from control is without foundation.*

Little time need be spent in considering appellant's contention "that rentals by the week are not under the rent controls, i. e., that only bimonthly, monthly,

and upwards are under the rent control as they pertain to housing accommodations" (Br. 7). Significantly, the foregoing is a gratuitous conclusion without citation of authority. Indeed, the authority is to the contrary.

All rentals, including transient rentals were expressly controlled under the Emergency Price Control Act of 1942, as amended (cf. Section 1 (b), 50 U. S. C. A. 901 (b)). The statement of appellant as applied to the rental of his premises prior to June 30, 1947, is patently contrary to the Act.

In enacting the Housing and Rent Act of 1947 (50 U. S. C. A. 1881, et seq.), the Congress exempted certain accommodations from control (cf. Section 202 (c) (3), *infra*, p. 36), but did not exempt housing accommodations rented "by the week". The regulation issued pursuant to said Act (12 F. R. 4331) defined "controlled housing accommodations" as "any housing accommodation in any defense-rental area which is not specifically exempt from control or de-control under this regulation." Section 1 (b) of that regulation exempts many accommodations,²¹ but not accommodations rented "by the week". Rooms in rooming houses are exempt because they are covered by their own regulation (12 F. R. 4302). That regulation defines "term of occupancy" to mean "occupancy on a daily, weekly or monthly basis" (Section 825.101). In addition the housing regulation provides that the maximum rent for a housing accommodation

²¹ Some of these exemptions are: (1) Farming tenants, (2) service employees, (3) rooms in rooming houses, (4) resort housing, etc.

rented on the maximum rent date, is the rent collected on that date, without regard to whether it was rented "by the week".²²

Furthermore, this Court has decided cases in which the question of the overcharge turned upon a determination of whether the premises were rented on a daily or a weekly rate, or a daily and a monthly rate. *Wilcox v. Woods*, 181 F. 2d 1012 (C. A. 9th); *Roos v. Woods, supra*. Thus, the contention of the appellant is clearly without merit.

5. *All computations of the amount of restitution, either are correct or favor appellant.*

The appellant claims a miscalculation in the amounts of restitution to John R. Durham, Victor B. Barkley, J. M. Ashmore, and Carl Jones (Br. 8). However, an examination of the record discloses that the first was correct, and the latter two were less than the proof indicated they should be.

Appellant claims error as to the amount of restitution on apartment No. 1 (Br. 8). Schedule A listed the overcharges at \$440 (R. 5). The order of restitution is for \$480 (R. 18). The defendant admitted renting apartment 1 to Mrs. John Durham from September 1, 1947, to June 1, 1948 (R. 90). He also admitted collecting "\$50 every two weeks" (R. 90) for part of the term and "\$42.50 every two weeks" for the balance (R. 91). The Court found as a fact

²² Section 4 (a) reads as follows:

"Section 4. *Maximum rents.* Maximum rents (unless and until changed by the Administrator as provided in Section 5) shall be:

"(a) *Rented on maximum rent date.*—For housing accommodations rented on the maximum rent date, the rent for such accommodations on that date."

that the collections for two months were at the rate of \$100; and, \$85 per month for seven months (No. 3—R. 9). The findings as to the maximum rent was \$35 per month (No. 4—R. 9). The overcharges, therefore, were \$130 for the first two months, and \$350 for the last seven months, or \$480.

On Apartment 8, Crenshaw admitted Barkley occupied it from March 8 to June 1 (R. 92), and that he paid \$75.00 per month (R. 93). The legal rent is \$50 (R. 41). This totals 1 and $1\frac{1}{15}$ months or an overcharge for March of \$38.34, and an overcharge for May of \$25, or \$53.34.

Mrs. Ashmore admittedly occupied Apartment 9 from March 6, 1948, to June 1, 1948 (R. 94-95), for which she paid \$75.00 per month (R. 95). The legal rent was \$50 (R. 5, 47). The total for $3\frac{5}{6}$ months is \$75.50. On Apartment 37, she occupied from April 6, 1947, to March 6, 1948 (R. 102), for which she paid \$55 per month (R. 104). The legal rent was \$40 per month (R. 66), or an overcharge of \$165. The two total \$240.50.

Carl Jones occupied Apartment 48 from April 10, 1948, to June 1, 1948, at a rate of \$11.25 per week (No. 29, R. 13). The maximum rent was \$15.00 per month (No. 30, R. 13). This was an overcharge of \$7.50 per week for seven weeks, or \$52.50.

The appellant's claim of error in calculation is clearly contrary to the record.

6. *The Court properly ordered appellant to pay the overcharges to the Treasurer of the United States.*

As stated above the purpose of this suit was in the public interest to enforce compliance with the policy

stated by the Congress. *Porter v. Warner Holding Co.*, 328 U. S. 395; *Woods v. McCord*, 175 F. 2d 919 (C. A. 9th). Having invoked the aid of equity, the Expediter was entitled to an order taking all profit out of appellant's wrongdoing. “* * * courts of equity are free to act under Section 205 (a) in such a way as to be most responsive to the statutory policy of preventing inflation” (328 U. S. at p. 401).

Nor is there any specific restriction upon the court's jurisdiction or the form of its order in order to carry out the intent of the Act. “The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case.” *Hecht Co. v. Bowles*, 328 U. S. 321, 329. The Court below was justified in depriving the appellant of his illegal profits, even though it found it would be inequitable to order a refund to a tenant who perversely refused to assist the court in determining the issue. An order of payment to the Treasurer of the United States was within the authority of the Court “to mould each decree to the necessities of the particular case.” Moreover, “(t)here is nothing novel about a regulatory scheme whereby landlords who violate the law are denied the right to profit thereby” (Frankfurter, J. in *Woods v. Stone*, 333 U. S. 472, 479). So, in the highest traditions of equity, a court has jurisdiction in carrying out Congressional intent, to take the profit out of wrongdoing. The Court below properly ordered the excess rent collections paid into the Treasury of the United States.

CONCLUSION

It is respectfully submitted that the judgment below was correct and should be affirmed.

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FRANCIS X. RILEY,

Special Litigation Attorneyl,

Office of the Housing Expediter,

Washington 25, D. C.

APPENDIX

Emergency Price Control Act of 1942, as amended
(50 U. S. C. A. 901 et seq.):

SEC. 203. (a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Ap-

peals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or

price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

SEC. 204. * * *

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any pro-

ceeding instituted in accordance with this subsection.

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Housing and Rent Act of 1947 (50 U. S. C. A. 1881, et seq.):

SEC. 202. As used in this title—

* * * * *

(c) The term “controlled housing accommodations” means housing accommodations in any defense-rental area, except that it does not include—

* * * * *

(3) any housing accommodations (A) the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, except that contracts for the rental of housing accommodations to veterans of World War II and their immediate families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946, shall remain in full force and effect, or (B) which at no time during the period February 1, 1945, to January 31, 1947, both dates inclusive, were rented (other than to members

of the immediate family of the occupant) as housing accommodations.

Housing and Rent Act of 1947, as amended (50 U. S. C. A. 1881, et seq.):

SEC. 204. * * *

(d) The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202 (c).

Controlled Housing Rent Regulation (12 F. R. 4331):

Sec. 1, par. (b)

(b) *Decontrolled and exempted housing to which §§ 825.1 to 825.12 do not apply—(1) Exempted housing.* Sections 825.1 to 825.12 do not apply to the following:

(i) *Farming tenants.* Housing accommodations situated on a farm and occupied by a tenant who is engaged for a substantial portion of his time in farming operations thereon.

(ii) *Service employees.* Dwelling space occupied by domestic servants, caretakers, managers, or other employees to whom the space is provided as part or all of their compensation and who are employed for the purpose of rendering services in connection with the premises of which the dwelling space is a part.

(iii) *Accommodations subject to the Rent Regulation for Controlled Rooms in Rooming Houses and other Establishments.* Rooms or other housing accommodations subject to the provisions of Subpart B.

(iv) *Structures subject to underlying leases.*
(a) Entire structures or premises wherein more than 25 rooms are rented or offered for rent by any lessee, sublessee or other tenant of

such entire structure or premises, except as provided in (c) of this subdivision (iv).

Federal Rules of Civil Procedure (28 U. S. C. A. foll. 723c):

Rule 13. Counterclaim and cross-claim.

(h) *Additional parties may be brought in.*

When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

Rule 14 (a) *When Defendant May Bring in Third Party.*

Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. * * *

Rule 19. Necessary Joinder of Parties.

(b) *Effect of Failure to Join.*

When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. * * *

No. 12602

United States
Court of Appeals
For the Ninth Circuit.

B. M. CRENSHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Montana.

FILED

AUG 30 1950

PAUL P. O'BRIEN,
CLERK

No. 12602

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
District of Montana, Helena Division

No. 444

UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. M. CRENSHAW,

Defendant.

COMPLAINT

The United States of America alleges:

I.

That this action is brought in the name of the United States of America under and pursuant to the Housing and Rent Act of 1947, as amended, (50 U.S.C.A. 1881-1906 and P.L. 31, 81st Congress, 1st Session) which is hereafter referred to in this Complaint as the Act.

II.

That jurisdiction of this action is conferred upon this Court by Sec. 205 and 206(b) of the said Act and Title 28 U.S.C.A. 1345.

III.

That the defendant, B. M. Crenshaw, residing at 6 West Babcock, Bozeman, Montana, has been and is the landlord and operator of a certain controlled multiple unit housing accommodation located at 6 West Babcock, Bozeman, Montana, and has at the times mentioned herein rented and offered for rent

certain of the units within such housing accommodations.

IV.

That in the judgment of the Housing Expediter the defendant has engaged in acts and practices which constitute a violation of Sec. 204 of the said Act in that the defendant has charged the persons named in Schedule "A" attached to this Complaint, which is made a part hereof, the amounts specified in such Schedule as [3*] rentals for the periods and for the units within the accommodation located at 6 West Babcock, Bozeman, Montana, when the maximum rental as established pursuant to the said Act was no more than that set forth in the said Schedule which resulted in the overcharges therein computed.

V.

That more than thirty days have expired since the date of any of the rental charges set forth in the said Schedule "A," and none of the persons so charged have commenced any action therefor against the defendant herein pursuant to Sec. 205 of the Act within such thirty-day period, or at all.

VI.

That of the total overcharges alleged in the said Schedule "A," \$1,082.50, occurred within the year last past prior to the commencement of this action.

Wherefore, the plaintiff prays:

1. For a permanent and temporary injunction,

* Page numbering appearing at bottom of page of original Transcript of Record.

restraining and enjoining the defendant, together with his agents and servants, from charging or attempting to charge rentals in excess of the maximum rentals as prescribed under and pursuant to the Housing and Rent Act of 1947, as amended, for any of the housing accommodations operated by the defendant at 6 West Babcock, Bozeman, Montana, or from otherwise violating any provisions of this Act or any regulation, order or requirement made under or pursuant to said Act.

2. For an order of the Court directing the defendant to pay to those persons who have been charged rentals in excess of the maximum rentals as prescribed under and pursuant to the said Act, to-wit:

Name	Amount
C. A. Labbe.....	\$ 45.00
W. H. Westfall.....	50.00
R. G. Martin.....	175.00
L. W. Konecki.....	300.00
V. Cameron.....	25.00
K. Davis.....	325.00
L. S. Mann.....	37.00
(L. Reeves	
(L. Ketterer.....	120.00
R. H. Henke.....	180.00
	<hr/>
	\$1257.00

And if the Court find that some or any of the foregoing persons, or any of them, be not entitled in equity and good conscience to the refunds, then the

same be paid over to the Treasurer of the United States all for the purpose of enforcing the said Act.

3. For three times the amount of the overcharges that have occurred within the last year, to-wit: \$3247.50, provided, however, that if restitution be granted pursuant to Paragraph 2 of this prayer and for such overcharges that have occurred within such last year, that the plaintiff will waive such amount of this prayer as restored to the tenants.

4. For the costs of this action.

5. For such other and further relief as the Court may deem just and equitable.

Dated at Seattle, Washington, this 21st day of July, 1949.

/s/ C. E. KNOWLTON, JR.,

Attorney, Office of Housing
Expediter. [5]

SCHEDULE "A"

Landlord—B. M. Crenshaw

Premises—6 West Babcock
Bozeman, Montana

Unit	Tenant	Period	Chg per Mo.	Max. per Mo.	Overcharge
Apt. #7	C. A. Labbe	5-1-49/6-30-49—2 Mos.	\$65.00	\$42.50	\$45.00
Apt. #8	W. H. Westfall	5-1-49/6-30-49—2 Mos.	75.00	50.00	50.00
Apt. #9	R. G. Martin	12-1-48/6-30-49—7 Mos.	75.00	50.00	175.00
Apt. #14	L. W. Konecki	7-1-48/6-30-49—12 Mos.	75.00	50.00	300.00
Apt. #20	V. Cameron	5-2-49/6-2-49—1 Mo.	75.00	50.00	25.00
Apt. #21	Kathay Davis	6-1-48/through June 1949—13 Mos.	75.00	50.00	325.00
Apt. #30	L. S. Mann	April 1949—1 Mo.	55.00	18.00	37.00
Apt. #24	(L. Reeves (L. Ketterer	July 1-48/June 30-49—12 Mos.	75.00	65.00	120.00
Apt. #17	R. H. Henke	July 1-48/June 30-49—12 Mos.	55.00	40.00	180.00
Total.....					\$1,257.00

[Endorsed]: Filed August 16, 1949.

[Title of District Court and Cause.]

No. 444

ANSWER

Comes now the defendant, B. M. Crenshaw and answers the Bill of Complaint on file herein, as follows:

I.

Admits all of the allegations of Paragraphs I and III of said Complaint.

II.

Denies each and every allegation of Paragraphs II, IV, V, and VI of said Complaint.

III.

As a further and separate defense, and answering the whole of the Complaint and having denied the allegations of Paragraph II, and having admitted that said action was brought as alleged in Paragraph I, this answering defendant now alleges that said laws and acts described in Paragraphs I and II of this Complaint are unconstitutional and do not confer jurisdiction upon the United States to bring any action of any kind set forth in the whole of the Complaint herein, and do not confer power to grant the relief prayed for in Divisions 1, 2, 3, 4 and 5 of the prayer for relief in this Complaint, in that it violates and is repugnant to the due process clause of the Fifth Amendment of the Federal Constitution.

Wherefore, Defendant prays judgment of this Court, as follows:

1. That said action be dismissed and that plaintiff take nothing by its Complaint herein. [8]

2. That the relief demanded in the prayer of the Complaint at Divisions 1, 2, 3, 4 and 5, and each of them, be denied.

3. That the defendant have his costs in this action, and for such other and further relief as this Court may deem just and equitable to the defendant herein.

/s/ E. F. BUNKER,
Bozeman, Montana.

/s/ ERNEST A. PETERSON,
Bozeman, Montana.
Of Counsel with
Defendant B. M. Crenshaw.

State of Montana,
County of Gallatin—ss.

B. M. Crenshaw, being first duly sworn, upon oath deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing Complaint, and knows the contents thereof, and that the matters therein stated are true of his own knowledge.

/s/ B. M. CRENSHAW.

Subscribed and sworn to before me this 1st day of September, 1949.

[Seal] /s/ HOWARD M. LEWIS,
Notary Public for the State of Montana, Residing at
Bozeman, Montana.

My commission expires November 15, 1949.

Service of Copy Acknowledged.

[Endorsed]: Filed Sept, 2, 1949. [9]

[Title of District Court and Cause.]

No. 444

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came duly on for trial before the above entitled Court on the 28th day of September, 1949, the Honorable W. D. Murray, United States District Judge, presiding without a jury, C. E. Knowlton, Jr., attorney for the Office of the Housing Expediter, appearing for the plaintiff, and Ernest A. Peterson and Eugene F. Bunker, of Bozeman, appearing for the defendant, and certain facts having been stipulated to by the parties and evidence both oral and documentary having been introduced and the parties hereto having submitted briefs, the Court being fully advised in the premises now makes its

Findings of Fact

1.

That the defendant is and has been the landlord and operator of a certain multiple-unit housing accommodation located at 6 West Babcock Street, in the City of Bozeman, Montana, and has rented and offered for rent certain of the units within said housing accommodations at the times in these findings hereinafter mentioned.

2.

That the defendant rented Unit No. 7 within the Crenshaw Apartments to one C. A. Labbee for the two months from May 1, 1949 to June 30, 1949, and demanded and received from such tenant rent at the rate of \$65.00 per month.

3.

That on January 4, 1947, the Rent Director for the Bozeman Defense-Rental Area issued an order applicable to Apt. 7 within the [11] Crenshaw Apartments fixing the rent therefor at \$42.50 per month.

4.

That the defendant rented Unit #8 within the Crenshaw Apartments for the two months from May 1, 1949 to June 30, 1949, to one W. H. Westfall, and demanded and received from such tenant rent at the rate of \$75.00 per month.

5.

That on February 20, 1947, an order was issued by the Rent Director at Bozeman fixing the rent on

Apt. #8 within the Crenshaw Apartments at \$50.00 per month.

6.

That the defendant rented Apt. #9 within the Crenshaw Apartments for the six and one-third months from December 21, 1948 to June 30, 1949 to one R. G. Martin, and demanded and received from such tenant the sum of \$75.00 per month.

7.

That on February 20, 1947, the Rent Director for Bozeman issued an order fixing the maximum rent for Apt. #9 within the Crenshaw Apartments at \$50.00 per month.

8.

That the defendant rented Apt. #14 within the Crenshaw Apartments for the twelve months from July 1, 1948 to June 30, 1949, to one L. W. Konecki and demanded and received from such tenant for the use thereof the sum of \$75.00 per month, which sum this tenant by agreement and collusion with the defendant agreed to pay.

9.

That on January 6, 1947, an order was issued by the Rent Director for Bozeman fixing the maximum rent on Apt. #14 within the Crenshaw Apartments at \$45.00 per month.

10.

That the defendant rented Apt. #20 within the Crenshaw Apartments to one V. Cameron for the one month from May 2, 1949 to June 2, [12] 1949,

and that the defendant demanded and received from such tenant for the use thereof the sum of \$75.00 per month for such period.

11.

That on June 26, 1947, an order was issued by the Rent Director at Bozeman fixing the maximum rent for Apt. #20 within the Crenshaw Apartments at \$50.00 per month.

12.

That the defendant rented Apt. #21 within the Crenshaw Apartments to one Kathay Davis for the thirteen months from June 1, 1948 through June of 1949, and demanded and received from such tenant rental at the rate of \$75.00 per month.

13.

That the maximum rent as established for Apt. #21 within the Crenshaw Apartments, as disclosed by the records of the Bozeman office, Office of the Housing Expediter, was \$50.00 per month.

14.

That the defendant rented Apt. #24 within the Crenshaw Apartments to one L. Reeves and C. Reeves for the twelve months from July 1, 1948 to June 30, 1949, and demanded and received from such tenant the sum of \$75.00 per month, which sum these tenants by agreement and collusion with the defendant agreed to pay.

15.

That on February 20, 1947, the Rent Director for

the Bozeman Defense-Rental Area issued an order fixing the maximum rent on Apt. #24 within the Crenshaw Apartments at \$65.00 per month.

16.

That the defendant rented Apt. #17 within the Crenshaw Apartments to one R. H. Henke for the twelve months from July 1, 1948 to June 30, 1949, and demanded and received from such tenant \$55.00 per month.

17.

That the Area Rent Director for Bozeman, Montana, on January [13] 4, 1947, fixed the rent for Apt. #17 within the Crenshaw Apartments at \$40.00 per month.

18.

That no orders were or have been issued by the Rent Director or other authorized personnel of the Office of Housing Expediter or Office of Temporary Controls changing or altering the maximum rents fixed by the orders in these findings referred to up to the time of the trial of this case.

19.

That none of the persons paying rentals in excess of the orders and other records set forth in these findings have sued the defendant therefor pursuant to the Housing and Rent Act of 1947, as amended.

20.

That the defendant in demanding and receiving rentals in excess of the rentals provided for in the records and other orders referred to did not know-

ingly and wilfully charge these tenants in excess of the otherwise applicable maximum rentals, as established pursuant to the Housing and Rent Act of 1947, as amended, and from these Findings of Fact the Court makes the following

Conclusions of Law

1. That jurisdiction to hear and determine this cause is conferred on the Court by Section 206(b) and Section 205 of the Housing and Rent Act of 1947, as amended.

2. That regardless of the validity or invalidity of Section 204(j) of the Housing and Rent Act, the remaining portions of such Act are constitutional and valid.

3. That the validity or invalidity of rent orders issued pursuant to the Emergency Price Control Act may not be challenged in this court unless and until persons so desiring to challenge can show they have exhausted the administrative remedies provided for in such Act.

4. That the maximum rent on Apt. #7 within the Crenshaw Apartments is and was \$42.50 per month, and the defendant by charging C. A. Labbe \$65.00 [14] per month for the two months involved overcharged such tenant in the total amount of \$45.00.

5. That the maximum rent on Apt. #8 within the Crenshaw Apartments is and was \$50.00 per month, and the defendant by charging W. H. Westfall the

sum of \$75.00 per month for the two months involved overcharged such tenant in the total amount of \$50.00.

6. That the maximum rent on Apt. #9 within the Crenshaw Apartments is and was \$50.00 per month, and the defendant by charging R. G. Martin \$75.00 per month for the six and one-third months involved overcharged such tenant in the total amount of \$157.50.

7. That the maximum rent on Apt. #14 within the Crenshaw Apartments is and was \$45.00 per month, and the defendant by charging L. W. Konecki \$75.00 per month for the twelve months overcharged such tenant in the total amount of \$360.00, and that such tenant in the exercise of sound discretion of the Court, is not entitled to any refund therefor.

8. That the maximum rent on Apt #20 within the Crenshaw Apartments is and was \$50.00 per month, and the defendant by charging V. Cameron the sum of \$75.00 per month for the one month involved overcharged such tenant in the amount of \$25.00.

9. That the maximum rent on Apt. #21 within the Crenshaw Apartments is and was \$50.00 per month, and the defendant by charging K. Davis the sum of \$75.00 per month for the thirteen months involved overcharged such tenant in the total amount of \$325.00.

10. That the maximum rent on Apt. #24 within the Crenshaw Apartments is and was \$65.00 per month, and the defendant by charging L. Reeves and C. Reeves the sum of \$75.00 per month for the twelve months involved overcharged such tenants in the total sum of \$120.00, and that such tenants, in the exercise of sound discretion of the Court, are not entitled to any refund therefor.

11. That the maximum rent on Apt. #17 within the Crenshaw Apartments is and was \$40.00 per month, and the defendant by charging R. H. Henke the sum of \$55.00 per month for the twelve months involved [15] overcharged such tenant in the total sum of \$180.00.

Let Judgment for Restitution be entered accordingly.

Done in Open Court this 21st day of February, 1950.

W. D. MURRAY,

United States District Judge.

Presented by:

C. E. KNOWLTON, JR.,

Attorney for Plaintiff.

[Endorsed]: Filed Feb. 21, 1950. [16]

[Title of District Court and Cause.]

No. 444

JUDGMENT AND ORDER

This matter having come on for trial September 26, 27 and 28, 1949, and the Court having entered its Finding of Fact and Conclusions of Law herein, Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed that the defendant shall pay and restore to the following named persons the following sums which sums represent the amounts which this defendant has charged such persons in excess of the otherwise applicable maximum rents established under and pursuant to the Housing and Rent Act of 1947, as amended, in connection with such defendant's operation of the housing accommodations located at 6 West Babcock, Bozeman, Montana, to-wit:

C. A. Labbee.....	\$ 45.00
W. H. Westfall.....	50.00
R. G. Martin.....	157.00
V. Cameron.....	25.00
K. Davis.....	325.00
R. H. Henke.....	180.00
Treasurer of the United States.....	480.00

Total\$1262.50

That the sum payable to the Treasurer of the United States represents moneys collected by this

defendant in excess of the otherwise applicable maximum rents from tenants whom the Court has found not entitled in equity and good conscience to receive restitution.

It Is Further Ordered that the defendant shall pay the total of such sum referred to above, or \$1262.50 by check or money order payable to the Treasurer of the United States at the Office of the Housing Expediter, 905 $\frac{1}{2}$ -3rd Avenue, Seattle, Washington, whereupon [18] such sums shall be distributed by the Office of the Housing Expediter to the persons entitled thereto under the terms of this Order.

Plaintiff shall have and recover taxable costs herein upon due notice to the defendant thereof, and all relief except as herein given is denied.

Done In Open Court this 21st day of February, 1950.

W. D. MURRAY,
United States District Judge.

Presented by:

C. E. KNOWLTON, JR.,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 21, 1950.

Entered and Noted in Civil Docket February 23, 1950. [19]

[Title of District Court and Cause.]

No. 444

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice is hereby given that B. M. Crenshaw, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment and order entered in this action on the 21st day of February, 1950, and in which order it is set forth that the defendant shall pay and restore to the following named persons the following sums which sums represent the amounts which this defendant has charged such persons in excess of the otherwise applicable maximum rents established under and pursuant to the Housing and Rent Act of 1947, as amended, in connection with such defendant's operation of the housing accommodations located at 6 West Babcock, Bozeman, Montana, to-wit:

C. A. Labbee.....	\$ 45.00
W. H. Westfall.....	50.00
R. G. Martin.....	157.50
V. Cameron.....	25.00
K. Davis.....	325.00
R. H. Henke.....	180.00
Treasurer of the United States...	480.00
<hr/>	
Total	\$1262.50

That the sum payable to the Treasurer of the United States represents moneys collected by this

defendant in excess of the otherwise applicable maximum rents from tenants whom the Court has found not entitled in equity and good conscience to receive restitution.

That the defendant shall pay the total of such sum [108] referred to above, or \$1262.50 by check or money order payable to the Treasurer of the United States at the Office of the Housing Expediter, 905 $\frac{1}{2}$ -3d Avenue, Seattle, Washington, whereupon such sums shall be distributed by the Office of the Housing Expediter to the persons entitled thereto under the terms of this Order.

E. F. BUNKER,

ERNEST A. PETERSON,

Attorneys for Appellant.

[Endorsed]: Filed April 21, 1950. [109]

[Title of District Court and Cause.]

No. 444

BOND ON APPEAL

Whereas, the above named Plaintiff has secured a Judgment and Order in the District Court of the United States for the District of Montana, Helena, Division, against the above named Defendant for the direct payment of money from the Defendant in the sum of \$1,262.50 lawful money of the United States, payable to the Treasurer of the United States at the Office of the Housing Ex-

pediter 905 $\frac{1}{2}$ -3rd Avenue, Seattle, Washington, besides interest, and said Defendant is about to file "Notice of Appeal" in the said action to the United States Circuit Court of Appeals, for the Ninth District at San Francisco, California.

Now Therefore, the undersigned, National Surety Corporation, a Corporation created and existing under the laws of the State of New York, in consideration of the premises and of the appeal, does hereby undertake in the sum of \$250, and promises to the effect, that if said Defendant shall dismiss said appeal or if the Judgment be affirmed, the said Defendant will pay costs that may be awarded by the Appellate Court, not exceeding the sum of \$250.

Dated this 20th day of April A. D., 1950.

NATIONAL SURETY
CORPORATION,

By S. J. KAISLER, JR.,
Attorney in Fact.

Countersigned:

WAITE & COMPANY,

[Seal] By S. J. KAISLER, JR.,
Resident Agent,
Boseman, Montana.

[Endorsed]: Filed April 21, 1950. [111]

[Title of District Court and Cause.]

No. 444

ORDER EXTENDING TIME FOR FILING
AND DOCKETING RECORD ON APPEAL

Application having been made for extension of time for filing the record on appeal and docketing the appeal with the Appellate Court within forty days from the date of filing the Notice of Appeal herein; and good cause appearing therefor.

It is ordered that the time for the defendant, B. M. Crenshaw, for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the Ninth Circuit be extended to July 1, 1950, and that said defendant have such additional time for filing and docketing such record on appeal.

Dated at Butte, Montana, May 29, 1950.

W. D. MURRAY,
District Judge.

[Endorsed]: Filed May 29, 1950.

Entered & Noted in Civil Docket, May 31, 1950.

[Title of District Court and Cause.]

No. 444

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the above named District Court:

You will please take notice that B. M. Crenshaw, the Defenadnt in the above entitled action, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment and order entered in this action on the 21st day of February, 1950, in favor of the plaintiff and against the Defendant above named and said defendant hereby requests a transcript of the pleadings and of the testimony and evidence offered and received, and the original exhibits, rulings or statements of the Court, also all objections and exceptions of counsel, a transcript of the Court's findings of fact and conclusions of law and the judgment and order rendered herein, be made up and prepared.

Dated this 15th day of June, 1950.

E. F. BUNKER,

E. A. PETERSON,

Attorneys for Defendant and Appellant, B. M.
Crenshaw.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 16, 1950. [115]

In the United States District Court, District of
Montana, Helena Division.

No. 444

UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. M. CRENSHAW,

Defendant.

REPORTER'S TRANSCRIPT

Be It Remembered, that the above cause came on regularly for trial before the Hon. W. D. Murray, United States District Judge for the District of Montana, sitting without a jury, in the Court Room of said Court in the United States Post Office Building, Butte, Montana, on the 26th and 28th days of September, 1949, Mr. C. E. Knowlton, Jr., Seattle, Washington, appearing as attorney for said plaintiff; and the defendant, B. M. Crenshaw, being present in person, and represented by his attorneys, Messrs. E. F. Bunker and Ernest A. Peterson, of Bozeman, Montana.

Whereupon, on September 26th, the following proceedings were had:

Mr. Peterson: May it please the Court, in Cause No. 444, the United States of America, vs. B. M. Crenshaw, comes now the defendant, B. M. Crenshaw, and moves that this Court should dismiss the complaint against him for want of jurisdiction of said Court over the subject matter therein con-

tained, on the [21] grounds that the only basis or reason for claiming jurisdiction in this Court is the validity of the Housing and Rent Act of 1947, as amended by the 81st Congress, First Session, and that said amendment, known as the Housing and Rent Act of 1949, is invalid; that the option provisions of said 1949 Act, Section 204 J (1), (2) and (3), are unconstitutional and void for the reason that the Congress has improperly delegated its war powers to states and municipalities by allowing them to set their own rent controls, making the whole of the 1949 rent control invalid, notwithstanding the saving clause.

If your Honor please, this matter is discussed fully in an opinion by Judge Shaw of the Northern District of Illinois in the Seventh Circuit. The opinion is a recent one. It appears in the advance sheets of the Federal Supplement under date of September 12, 1949. The case will be reported in Volume 84, Number 9 of the Federal Supplement. I might say, quoting from Judge Shaw's opinion, and, while I fully realize, your Honor, that your Honor is not bound by this opinion, I think the discussion contained in the opinion is enlightening and throws a great deal of light upon the question of whether or not this Court has jurisdiction of this case.

It is true that Congress has only such powers as is given to it by the Constitution of the United States, and certain powers which are derived by implication. Judge Shaw, in his opinion, says, "The precise question for decision in this case [22] is the

validity of the Housing and Rent Act of 1949.” I don’t want to trespass upon your Honor’s time, but has your Honor read this opinion?

The Court: No, I haven’t.

Mr. Peterson: I have it here and I would be glad to show it to your Honor. The principal point here raised in the matter is that the whole 1949 Act is invalid by reason of the delegation of the war powers to a state or municipality. The Congress of the United States, operating under the war powers contained in Article 1, Section 8 of the Federal Constitution, of course, has the powers to pass legislation which in any way would aid the government in prosecuting the war, and it is assumed and pointed out that the entire purpose of this Act was to do that. But the 1949 amendment, as stated in the preamble of the Act, was definitely for the purpose of bringing about a condition which would make it repealable. Now, the Congress did not see fit to extend the 1947 Act, but it amended it by saying that the thing to do was to make it possible to alleviate any injustice or any wrong, and make it repealable as soon as possible. And the provision, the option provision in the Act, apparently, is for that purpose. The Court held, that is, Judge Shaw held in this case which arose in Chicago, that by reason of Subsections J(1), (2) and (3), that the powers delegated to the states here contravened the Federal Constitution and were improper; and he says that that is of enough importance [23] to invalidate the entire Act, notwithstanding the pro-

visions of the saving clause. He goes into a discussion of the Congressional reports, the arguments in the United States Senate and in the Committee, where the question was never raised as to the war powers of Congress, but it was discussed more or less on economic grounds, and the provision that went into the Act was: we are going to try to repeal this as soon as we can in order to avoid hardships which might accrue to landlords and others. The Court said that that was similar to a war power of Congress being delegated, such as the raising of soldiers for war or conflict under the Selective Service Act, and leaving it up to the legislatures or town councils of the various communities to say whether or not they would raise the quota. That, as the Court said, would nullify the Act. The Court said, "There is one more reason for holding the law indivisible, and I think it is a conclusive one, one that closes the door on all argument. Had Congress desired and intended to continue rent control without these local option clauses, it could have done so by a simple Act extending the expiration date of the then existing law. It follows that I must necessarily find the entire Act invalid, and being invalid, this Court has no jurisdiction."

Upon the reasoning contained in that opinion, your Honor, and by reason of the fact that this Court has the right to determine whether or not it has jurisdiction, we submit that [24] the Cause Number 444 should be dismissed. I would like your Honor to consider that matter and read that opinion.

Mr. Knowlton: I have a copy of the Act here, which the Court may like to look at during the course of this proceedings.

Mr. Peterson: In connection with that, I understand that there is a movement on the part of the government attorneys — Mr. Kaplan, I believe, is the attorney for the Housing Expediter in Chicago, and I have pretty reliable information on that that there is an appeal directed to the Supreme Court rather than through the Circuit Court. They are going to try to determine this question whether or not it is unconstitutional.

Mr. Knowlton: If your Honor please, that is my information, too, that the Shoreline Cooperative case is now on direct appeal to the United States Supreme Court, and certiorari has been allowed in that case.

The Court is probably familiar with the case of Woods against Miller, 68 Supreme Court, 421, in which the Housing and Rent Act was first brought up to the Supreme Court; the Supreme Court, after the Act had been found unconstitutional in the District Court, found the Act constitutional. That is the only case where the Act has been before the Court on constitutional grounds.

The reason why the District Court in the Shoreline Cooperative case, cited by counsel, found the Act was unconstitutional was based upon the fact that it found certain provisions of [25] the Act to be invalid. Without going into the question of whether the provisions are valid or not, it certainly

is a fact that if the provisions are separable from the rest of the Act, why there is no question of the validity of the rest of the Act. This action here hasn't got anything to do with Section 204-J, cited by counsel, and which the Court in Chicago found to be invalid. Section 204-J is an amendment allowed by the 1949 Act, whereby the local governing bodies of cities, towns and villages, and also state legislatures, after making certain findings, could recommend decontrol of their particular communities. On the question of separability, certainly that section allowing such decontrol of various communities hasn't got anything to do with the enforcement provisions of the Act which are before the Court at this time. Their validity or invalidity hasn't got anything to do with whether Mr. Crenshaw has charged more than the maximum rents applicable to particular housing accommodations. Certainly the test of whether one section being invalid renders the rest of the Act invalid is whether the rest of the Act is so interconnected with the section found to be invalid that the finding of the section to be invalid defeats the rest of the Act. Now, the case that the Judge there in Chicago relied upon was Carter against the Carter Coal Company case. I haven't the decision, but it is cited in that case. In that case the Supreme Court had the question before it as to the [26] validity of certain coal acts which attempted to set certain prices on delivery of coal. It set forth a formula as to how wages were to be computed, and then set forth a

formula as to how prices should be computed for the sale of this coal. It appeared that the wages were part of the determination of the prices. They found the wage part to be unconstitutional, and consequently, it was obvious that they had, because of the fact they were so intertwined, to find the price section invalid; so that actually, *Carter vs. Carter Coal Company* doesn't support the decision, as a matter of fact.

The conclusive argument used by the Court in Illinois is to this effect: He says if Congress merely wanted to extend the 1947 Act, all they would have had to do was pass a simple resolution extending it instead of putting these decontrol features in. It is inferred in the Court's opinion that that is all Congress did. As a matter of fact, it isn't all Congress did. In addition to the fact that they added provisions for decontrol, they made a number of changes. Prior to the 1949 amendment, the landlord and tenant could increase rents by leases. There is no provision for that; no provision for the United States or anybody else to sue for treble damages, except the tenant. The previous Act did not provide that the United States should be the party plaintiff while this Act so provides, and there are a number of changes in connection with this thing. As a matter of fact, it provides [27] for recontrol of large groups of housing accommodations which weren't controlled by the previous act, such as housing which is first rented, provided it isn't new, and leases which had terminated during

certain specific dates which were decontrolled prior to the enactment of this Act. So, the conclusive argument of the Court seems to indicate that the Court never read the Act. I submit the Act, until the Supreme Court rules otherwise, is constitutional under the authority of the case of *Woods vs. Miller*.

Mr. Peterson: May it please the Court, may I add that the Presiding Judge in the Northern District of Illinois called attention to the preamble of the 1949 Act, and he indicated and argued — not argued, but pointed out — that the main feature of the 1949 Act was to do away with rent control in such a way as to relieve the economic impact, and so, according to the research made by the District Judge, that is the important feature of the 1949 Act. The Court held that that feature of the Act was the important feature of the Act and it was so intertwined with the other features of the Act that if that be invalid, the whole 1949 Act is invalid and void, the rule, I submit, being that if the valid and invalid parts of the law are bound together so that the immaterial part is a material inducement to the whole, the whole is void. We submit, your Honor, the Court has no jurisdiction.

The Court: What is the citation of the *Miller* case that you [28] refer to?

Mr. Knowlton: 68 Supreme Court, 421. Your Honor, I might say the declaration of policy contained in the present Act is the same one as always existed in this Act and was at the time the *Miller* case was decided by the Supreme Court.

The Court: The motion is in Cause No. 444, is that it?

Mr. Peterson: Yes, your Honor.

The Court: The same argument is not made with reference to the other cause pending, 373?

Mr. Peterson: It would not be applicable, your Honor.

The Court: If I understand the argument, then, it is upon the amendment that the Act became unconstitutional?

Mr. Peterson: Yes, your Honor.

The Court: And that because of the decontrol features of the Act——

Mr. Peterson: The Act is void.

The Court: And the whole of it, because of the decontrol features of the amendment, the whole Act falls?

Mr. Peterson: Yes.

The Court: Very well, the Court is going to consider your argument. The Court will stand in recess until 11 o'clock so that I can have time to read the cases cited, and there is no use going any further if your argument is sound, so the Court will stand in recess until 11 o'clock.

(Whereupon, a recess was taken until 11 o'clock, [29] A. M., the same day, September 26, 1949, at which time the following proceedings were had:)

The Court: The matter which the Court now has under consideration does not go to the cause No. 373, but the Court wishes to take a little more

time to consider the matter, and so I don't want to confuse myself in the consideration of that matter with the proceeding of the hearing of evidence in Cause No. 373, so that case will be continued until two o'clock this afternoon, and the Court will keep under advisement the motion with reference to jurisdiction of the Court in the other case, No. 444. If either counsel have any further citations they wish to call to the Court's attention, I will be pleased to receive them. I might say, Mr. Peterson, in a case of this nature where such an important question is raised the Court would appreciate it if it had been raised sometime ago so that I could have devoted many hours or days of study to the matter. However, I appreciate that circumstances sometimes don't permit that to be done, but I do wish in the future you would keep that in mind in matters of this kind.

Mr. Peterson: I appreciate that. I might say in connection with this, it was only a few days ago that I got this decision. I wasn't informed.

The Court: Yes, surely. I understand that. Is there any further citation of authority you would like to have the Court consider? [30]

Mr. Peterson: I haven't any.

The Court: Do you have any?

Mr. Knowlton: I haven't any with me. I could furnish the Court with a brief in the matter if the Court, after hearing the evidence, should want to further consider it.

The Court: If I can, I am going to rule on the matter at two o'clock and dispose of it if my mind

is clear as to the decision I should make, but if, in the meantime, you have anything you care to present to me, I will consider it. Court will stand in recess until two o'clock this afternoon.

(Whereupon, a recess was taken until 2 o'clock, P. M., the same day, September 26, 1949, at which time the following proceedings were had:)

The Court: With reference to the motion in Cause No. 444, the Court has considered the motion and read the authorities that have been submitted to the Court in that connection, and finds that it cannot follow the decision of the District Court in the case of Woods vs. Shoreline Cooperative Apartments in holding that the invalidity of Sections J-1, J-2 and J-3 of the Act caused the entire act to fall. From my reading of the Act, it appears to me first, that the methods of decontrol set forth in those subsections are just some of the methods of decontrol; that other provisions are made for the decontrol of rent areas, and so, while the Congress has expressed a desire and a policy to decontrol as soon as practicable under the [31] circumstances that exist, that decontrol can still occur even though it be held that Sections J-1, 2 and 3 are invalid. The Court in the case cited has placed great stress upon the principle that the declaration of policy advises that the Congress wants to decontrol as soon as possible, but on the other hand, the Congress has passed an Act authorizing control. The purpose of the Act cannot be said to decontrol. The purpose

of the Act is to control, and within that purpose, it will be the policy to decontrol as soon as possible; so this Court does not feel that even accepting the proposition that Subsections J-1, 2 and 3 are unconstitutional, that the failure of those sections invalidates the whole Act. The motion is, therefore, denied.

Mr. Peterson: Your Honor, my understanding is that it is not necessary to note any exceptions to the Court's rulings under the rules.

The Court: No, you need not note an exception.

Mr. Peterson: Thank you, your Honor.

The Court: As I say, I haven't been able to follow the argument in that case that the principle purpose of this Act is to decontrol. I accept it that the principle of the Act, the purpose of the Act, is to control primarily, and to decontrol as soon as possible; and the declaration of policy does not carry with it as much weight as the real purpose of the Act. The Court in that case considers that because the Act was passed [32] with such a declaration that that was the real purpose of the Act, whereas, we may consider that those provisions were inserted because of political pressure to decontrol in the face of the desire of Congress to control; and so, I do not accept the reasoning of the Court in that case, and I will not declare that this Court does not have jurisdiction because of the failure of Subsections J-1, 2 and 3, so that case will be ready to proceed to trial as soon as we get to it at the conclusion of this case, No. 373.

(Whereupon, further proceedings in this cause were continued until 11 o'clock A. M., September 28, 1949, at which time the following proceedings were had:)

The Court: United States vs. Crenshaw, No. 444.

Mr. Knowlton: In connection with this case, your Honor, there are a number of apartments that are the same as were involved in the previous case just tried before your Honor. In connection with those apartments that are the same, namely, 8, 9, 14, 20, 21, 24 and 17, so far as the evidence relative to the maximum rents introduced by the plaintiff, it would be the same, and I should like so much of the record in the first case as material to the second to be introduced in the second case.

Mr. Peterson: If the Court please, I like that suggestion. If counsel could get together, we might stipulate to a briefer record on that. It appears that Apartments 8, 9, 12, [33] 17, 20, 21, 24 and 30—30 is deleted, I believe — are pertinent to the issues in this case. Perhaps we could get together.

The Court: It is nearly the noon hour. Court will stand in recess until two o'clock. In the meantime, you can get together and maybe eliminate some of the proof necessary. Court will stand in recess until two o'clock.

(Whereupon, a recess was taken until 2 o'clock P. M., the same day, September 28, 1949, at which time the following proceedings were had:)

Stipulation of the Parties as to Issue

The Court: United States vs. Crenshaw, No. 444. What is the situation now?

Mr. Knowlton: I think we are ready to go, your Honor. We will get this stipulation in first. The parties hereto, through their attorneys, have entered into a stipulation relative to certain parts of the record that may appear in connection with this cause on trial. The parties hereto, through their counsel, stipulate that the records of the Housing Expediter at Bozeman will show an order issued on January 4, 1947, fixing and establishing the maximum rent for Apartment 7 within the Crenshaw Apartments at \$42.50 per month. No order has subsequently been made relative to such apartment; that such order shows on its face that it was deposited in the United States Mail on or about the date it was issued. The records of such office would further show that on February 20, 1947, an order was issued fixing the maximum rent on Apartment [34] 8 at \$50 a month. A copy of such order was introduced in Cause No. 373, Helena Division, and no further order has been made concerning the rent on such apartment; that the records of such office would show that on February 20, 1947, an order was issued fixing the maximum rent on Apartment 9, Crenshaw Apartments at \$50 per month. That a copy of such order was introduced in Cause 373, Helena Division, as Plaintiff's Exhibit 3, and no further order has been made concerning the rent of such apartment.

The records would further show that on January 6, 1947, an order was issued fixing the maximum rent on Apartment 14, Crenshaw Apartments, at \$45 per month, furnished. That a copy of such order was introduced in Cause 373, Helena Division, as Exhibit 5(b). No further order has been made relative to such apartments.

The records of such office would further show that on June 26, 1947, an order was issued fixing the maximum rent on Apartment 20, Crenshaw Apartments at \$50 per month. That a copy of such order was introduced in Cause 373, Helena Division, as Plaintiff's Exhibit 9. No further order has been made relative to such apartment.

That the records of such office would further show that on January 4, 1947, an order was issued fixing the maximum rent on Apartment 17, Crenshaw Apartments, at \$40 per month. That a copy of such order was introduced in Cause 373, Helena, [35] as Plaintiff's Exhibit 7, and no further orders have been made relative to such apartment.

It is further stipulated that the maximum rent established on Apartment 21 during the time involved in this complaint was \$50 per month. It is further stipulated that there appears in the records an original of an order relative to Apartment 24 in the Crenshaw Apartments, stating the maximum rent was established at \$50 per month, unfurnished, and such order further set and fixed the maximum rent at \$65 per month, furnished. Said order was issued February 20, 1947.

The Court: Is the purpose of that stipulation that the Court can consider the orders and testimony with reference to those orders given in the other case?

Mr. Knowlton: I would think so.

Mr. Peterson: We didn't discuss that, your Honor.

The Court: In other words, will the evidence that has been given in the other case covering identical issues that are raised in this case, will that evidence be considered as going to the issues in this case?

Mr. Peterson: I think it may be agreed and understood, your Honor.

Mr. Knowlton: There is one additional apartment, that is No. 7. That wasn't in the previous case. All the rest were in the previous case.

The Court: Is the issue in this case the question of whether [36] or not notice was given to the defendant and he knew of the orders?

Mr. Peterson: That will be part of it.

The Court: What else is at issue?

Mr. Knowlton: The amount of the rental charged.

The Court: The amount of the actual charges?

Mr. Bunker: The amount of the overcharges, if any.

Mr. Knowlton: I think also the defendant may want to put on some testimony as to whether it was wilful or not.

Mr. Peterson: I think that comes within the

purview of the statute whether or not the Court in good conscience could impose treble damages.

The Court: Very well, proceed.

Mr. Knowlton: Call Mr. Crenshaw as an adverse witness.

Mr. Bunker: To which we object on the grounds and for the reason that this is a penalty statute. If he calls him he calls him as his witness and not as an adverse witness.

The Court: What is your authority on the matter?

Mr. Bunker: The authority on that is that he has asked the Court to give treble damages. In that case, it becomes a penalty statute, and under a penalty statute, you may not call an adverse witness.

The Court: Do you have any authority contrary to that?

Mr. Knowlton: This is only a civil action. The only time I ever heard of that a person can claim any sanctity is [37] in a criminal action.

Mr. Bunker: The Court so ruled in one of the other cases.

Mr. Knowlton: It might have been that Crenshaw might have testified and then been prosecuted criminally for what he said, but this is no criminal action. It is a civil action and there is nothing in the Act or any place that I know of where he can't be called as an adverse witness.

Mr. Bunker: In the other action, it was entirely on the basis of being a treble damages action.

The Court: Do you have any authority besides your statement?

Mr. Bunker: No, I haven't looked for any authorities. It has been twice in this Court, so I figured that was that.

The Court: What was the basis of the ruling protecting a defendant against being called as a witness.

Mr. Bunker: If you call him as a witness where he is subject to a penalty, not in an actual criminal case or something of that kind, you make him your own witness if you call him to your side. The state statute under which this power is given is in a civil case not covering a penalty. I think there was an old decision, it has been so long ago since I looked it up. It was in 1943, your Honor, that the statute was passed, but I can't tell you what that ruling was.

The Court: Of course, the matter is important.

Mr. Bunker: In the other case, I didn't object because there was no penalty. [38]

Mr. Knowlton: This procedure would be governed by federal rules, not what the state legislature in the State of Montana may have done. The only federal rule I know of is the constitutional guarantee against self-incrimination in a criminal case. You can't make a man testify against himself in a criminal case.

The Court: The penalty here isn't in the nature of a criminal penalty.

Mr. Bunker: It is a smarting penalty.

The Court: It is in the nature — it may be a penalty, but it is in the nature of whatever penalty a court of equity issues.

Mr. Bunker: I don't think a court of equity without the statute could possibly do that.

The Court: It is true it is statutory, but I mean it is in that nature. The purpose of it is to correct.

Mr. Bunker: That is true.

Mr. Knowlton: There have been a number of cases, your Honor, including, I believe, one in this Circuit that have held this treble damage remedy is a remedy and not a penalty.

The Court: The matter is of such importance that I would like to have some authority on it. Court will stand in recess for 20 minutes to look into the matter.

(20-minute recess.)

The Court: The Court will come to order. What was the objection? [39]

(Objection read back by reporter.)

The Court: Overruled. Take the stand, Mr. Crenshaw.

B. M. CRENSHAW

called as an adverse witness by the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Knowlton:

Q. State your name, please.

A. B. M. Crenshaw.

Q. You are the defendant in this suit now on trial?

A. Yes, sir.

(Testimony of B. M. Crenshaw.)

Q. You have been operating the Crenshaw Apartments at 6 West Babcock Street, Bozeman, Montana? A. Yes, sir.

Q. How long have you been so operating them?

A. Ten years.

Q. You are presently the operator?

A. How is that?

Q. You are presently operating them?

A. Right now, yes.

Q. Do you recall having a tenant in Apartment 7 by the name of Labbe? A. Yes, sir.

Q. Do you recall when he was there? [40]

A. I think it was April 1st.

Q. Do you recall when he moved out?

A. A month or so later. He was there, I think, approximately two months.

Q. Do you recall how much you charged him for his rent? A. \$65.

Q. Do you recall having a tenant by the name of Westfall in Apartment 8?

A. Yes, sir.

Q. Do you remember how long he was there?

A. About the same period of time.

Q. Do you recall how much you charged Mr. Westfall?

A. I charged him \$65 and \$10 for the use of beds and services.

Q. He had an extra bed, is that true?

A. Yes, sir.

Q. Do you recall having a tenant by the name of Martin in your property? A. Yes.

(Testimony of B. M. Crenshaw.)

Q. Apartment 9, wasn't it?

A. Yes, sir.

Q. Do you recall when he moved?

A. I don't recall, I would have to look at the receipt book.

Q. Do you recall how much you charged him?

A. \$65 and extra service.

Q. How much for the extra service? [41]

A. \$10.

Q. He is still there?

A. He is in 7 at the present time.

Q. He moved from 9 to 7? A. Yes.

Q. Do you recall when that was?

A. I would have to look it up.

Q. Major Konecki is still there?

A. Yes, sir.

Q. He has been there quite awhile?

A. A couple of years or better.

Q. He is still there? A. Yes, sir.

Q. How much have you charged Mr. Konecki?

A. \$65.

Q. You don't charge him \$75?

A. \$65 and \$10 for the use of furniture and stuff he requested me to put in.

Q. Did you collect rent from him on the first of the month? A. Yes, sir.

Q. Did you collect \$65 and \$10 for the extra service?

A. For the furniture he wanted extra.

Q. You collected that on the first of September of this year?

(Testimony of B. M. Crenshaw.)

Mr. Bunker: Objected to as incompetent, irrelevant and immaterial and no part of this case.

[42]

The Court: Overruled.

Q. You collected on the 1st of September of this year—

A. \$65 for rent and \$10 for the furniture he requested.

Q. Do you recall having a tenant by the name of Cameron in Apartment 20?

A. He was there a little over a month.

Q. How much did you charge him while he was there?

A. \$65 and extra for the extra beds?

Q. How much extra. A. \$10.

Q. You still have a tenant by the name of Kathay Davis in Apartment 21, haven't you?

A. Yes, sir.

Q. Do you recall when she moved in?

A. About six months ago or better.

Q. More than that, wasn't it?

A. It might have been.

Q. How much did you charge her?

A. \$65.

Q. Do you charge her anything extra?

A. For cleaning and other services.

Q. You charge her \$10 more, is that right?

A. Yes, sir.

Q. Apartment 24, you have some girls in there?
How many girls?

(Testimony of B. M. Crenshaw.)

A. Three in there; I wouldn't know whether there was three [43] or two.

Q. They have been there quite a while, haven't they? A. Yes.

Q. How much do you charge them? A. \$65.

Q. You charged for the extra girl?

A. The extra furniture they requested.

Q. Mr. Henke is in 17? A. Yes.

Q. He has been for a couple of years?

A. Yes.

Q. How much do you charge him?

A. \$50. Just the same as the other, he has davenport. I had to take mine out and I charge him \$5 a month extra.

Q. In any of the cases in which you charge for what you say is extra service, have you ever petitioned the office there in Bozeman for permission so to charge?

A. I didn't know I had to.

Mr. Knowlton: That is all.

Cross-Examination

By Mr. Peterson:

Q. How long have you been operating the Crenshaw Apartments at 6 West Babcock Street, Mr. Crenshaw?

A. Since June 15, 1940, that is as an apartment house. I [44] took it over December 11, 1937.

Q. What is the population, resident population of your apartment house?

(Testimony of B. M. Crenshaw.)

A. I think we counted yesterday. There is an even hundred.

Q. What type—in what city is the apartment house located? A. Bozeman, Montana.

Q. There are — are there any defense plants, military installations, or munitions plants in the vicinity of your apartment house or in the vicinity of Bozeman, or have there been any during the time you have operated? A. No.

Mr. Peterson: No further examination.

Redirect Examination

By Mr. Knowlton:

Q. I should like to ask one additional question. Have any of these people I have asked you about when I examined you on direct sued you for overcharges? A. No, sir.

Recross-Examination

By Mr. Peterson:

Q. Have any of the persons named in the complaint and referred to in the testimony here in the interrogatories by Mr. Knowlton, C. A. Labbe, W. H. Westfall, R. G. Martin, L. W. [45] Konecki, V. Cameron, Kathay Davis, L. Reeves, L. Ketterer, or R. H. Henke, have they demanded of you any payment of the overcharges?

A. We have come to a settlement.

Q. Have they demanded of you any overcharges?

(Testimony of B. M. Crenshaw.)

A. No, sir.

Q. Have you made a settlement with any of them? A. Yes, sir.

Q. Which ones?

A. The list is there, you will have to read it off.

Q. Have you made any settlement with Labbe?

A. I couldn't find him.

Q. Have you made any settlement with W. H. Westfall? A. I couldn't find him.

Q. Have you made any settlement with R. G. Martin? A. Yes, sir.

Q. Have you made any settlement with L. W. Konecki? A. Yes, sir.

Q. Have you made any settlement with V. Cameron? A. I couldn't find him.

Q. Have you made any settlement with Kathay Davis? A. No.

Mr. Bunker: Mr. Knowlton, did you withdraw the question of Mr. Mann?

Mr. Knowlton: Yes. [46]

Q. Have you made any settlement with L. Reeves or L. Ketterer?

A. Yes, sir.

Q. With R. H. Henke?

A. Yes, sir.

Redirect Examination

By Mr. Knowlton:

Q. When did you make the settlements?

A. After we got notice to appear here.

Mr. Knowlton: I should like to have all the evidence of settlement with the individual tenants

(Testimony of B. M. Crenshaw.)

stricken because any action by the tenants is barred when the government sues. It is absolutely immaterial for the purposes of this case. The government has the right of action here for treble damages. Even if the tenant sued, it could be defended against because it is barred. The Act so provides.

Court: I will overrule the objection. What kind of settlement did you make with Labbe? Did you make a settlement with Martin? ..

Witness: Yes, sir.

Court: What kind of settlement did you make with him?

Witness: We agreed everything was paid up to date for the services I had rendered. I got a receipt for it, just the same as (interrupted)——

Court: I mean you didn't pay him anything back or agree [47] to give him some rent in the future, is that it?

Witness: I will.

Court: I am just inquiring what your agreement was. You said you made a settlement. What was the settlement?

Witness: Read the receipt. That was the agreement, that receipt.

Court: What?

Witness: I have the receipts there.

Court: Just tell me what your settlement was with him. What did you agree to do?

Witness: I showed him this receipt I had written out. I says, "Do I owe you anything?" They

(Testimony of B. M. Crenshaw.)

says, "No." I says, "Will you sign this receipt that you are paid up in full?" They said, "Yes", they would sign the receipt. I said, "I have given you services that wasn't called for", and they were satisfied.

Court: There was no settlement made. You made no settlement of an account. All you did, you just went to them and said, "I don't owe you anything", is that right?

Witness: No. I says, "Do you want any money back, are you satisfied?" I says, "Will you sign a receipt?" They says, "Yes."

Court: Do you have the receipt there?

Witness: Yes.

Court: Let me see it. Just one of them is sufficient. [48] Have you got one with Martin? I think that is the one we have been discussing. You gave him that paper and he signed it, is that right?

Witness: Yes, sir.

Court: Mark this as an Exhibit. Calling your attention to Plaintiff's Exhibit No. 1, is that the document you gave to Mr. Martin, and that he signed?

Witness: Yes, sir.

Court: It purports to have been made on August 23, 1949, is that right?

Witness: Yes, sir.

Court: Is that the date this was done?

Witness: Yes, sir.

Court: Was there any exchange of consideration? Did he give you anything, or did you give him

(Testimony of B. M. Crenshaw.)

anything in connection with this settlement? Did you give him anything? Did you give him anything or promise him anything to sign this?

Witness: I can't figure it out.

Court: Just that. Did you give Mr. Martin anything or promise him anything to have him sign this?

Witness: I says, "This suit figures I owe you so much money. Do I owe you anything?" He says, "No." I says, "Will you sign this receipt?"

Court: That is all. You didn't give him anything or promise him anything in the future? [49]

Witness: No.

Court: Very well, the Court, on its own motion, will admit in evidence Plaintiff's Exhibit No. 1.

Plaintiff's Exhibit 1, here received in evidence, is as follows:

"No.....

Bozeman, Montana, August 23, 1949.

"Received from B. M. Crenshaw, settlement in full of my alleged claims for rentals in excess of maximum rentals as set forth in Complaint in Civil Action No. 444, U. S. vs. Crenshaw, Helena Division.

\$..... /s/ R. G. MARTIN"

Court: Is there any objection to it?

Mr. Knowlton: I would like to see it, your Honor. I have no objection except the one based on the same grounds as before.

(Testimony of B. M. Crenshaw.)

Court: That it occurred after the commencement of the action?

Mr. Knowlton: Yes.

Court: Well, the Court is not going to consider it for any purpose of reducing the amount that may or may not have been owed, but is considering it from the standpoint of the defendant's action in it and his knowledge as to whether or not there was any overcharge.

Mr. Knowlton: I understand that. I merely stated that for the record. [50]

Court: Is that the same kind of agreement, or as you say, settlement, that you made with all these others?

Witness: Yes, sir.

Court: Just the same thing. You went to them and asked them if you owed them anything, and they said, "No", and so they signed a similar document as that?

Witness: Yes, sir, these are the same thing.

Court: That is all.

Mr. Bunker: Did you consider your prior services, and did they consider your prior services would cover any extra amounts?

Witness: That is the way we understood.

Mr. Bunker: That is the way all of them understood it, isn't it?

Witness: Yes, sir.

Mr. Bunker: That is all.

(Witness excused.)

ROBERT G. MARTIN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Knowlton:

Q. State your name.

A. Robert G. Martin. [51]

Q. Where do you reside?

A. Apartment Number 7, Crenshaw Apartments.

Q. That is in Bozeman?

A. 6 West Babcock in Bozeman.

Q. Where did you reside prior to the time you resided in 7?

A. In 9.

Q. Would you state when you moved into 9?

A. I moved into the Crenshaw Apartments the 21st of December, 1948. I moved into an apartment up on the third floor. I can't recall the number. I was there for about two weeks, and it must have been about the first of January when I moved into 9.

Q. Do you recall when you moved from Apartment 9 to Apartment 7.

A. It was on the first day of July, 1949.

Q. Do you recall what rent you paid for your occupancy of Apartment 9?

A. Seventy-five dollars a month.

Q. What was your agreement with Mr. Crenshaw when you first moved into Apartment 9 as to what rent you were to pay for such apartment?

(Testimony of Robert G. Martin.)

A. \$75 a month rent.

Q. Was any mention made concerning part of it was for rent and part of it was for services?

A. No—would you please repeat that? [52]

Q. I asked you if any mention was made—in other words, what I was trying to find out is whether, when you went and engaged the apartment, he said so much was rent and that was all there was to it, or whether he broke it down some way?

A. It was all one figure.

Q. In other words, you rented the apartment as it was, as he showed it to you, and that was the amount you agreed to pay for it?

A. That's right.

Q. Showing you Plaintiff's Exhibit 1, will you state whether or not that is your signature on that?

A. It is.

Q. Under what circumstances did you happen to sign that?

A. Mr. Crenshaw approached me with it and asked if I would sign it.

Q. Did you receive any consideration from Mr. Crenshaw for your execution of that instrument?

A. Not at the time I signed the statement.

Q. Or any other time?

A. No.

Q. Why did you sign it?

A. There were two reasons: first, he said this was in conjunction with a suit which is probably coming up, and if I would sign it, I would, no doubt,

(Testimony of Robert G. Martin.)

not have to attend a trial, in which capacity I am in at the present time. The other reason [53] is that I am at the present time three months behind in my rent, and he said that if I would sign this, we could work something out. However, nothing definite has been worked out to date.

Q. Any reason why you are behind in your rent?

A. Yes, I am owner and operator of the Boze-man Greyhound Bus Depot, and through the summer months the line was out on strike and I didn't make a penny.

Q. When was the last time you paid \$75 to Mr. Crenshaw?

A. The first of September.

Q. But you missed some months prior to the first of September?

A. Yes, I have it here. I didn't pay him the first of June, July or August. The strike which I refer to was from the first of May to the middle of August.

Q. However, Mr. Crenshaw has not given you any receipt in full, has he?

A. Not to date. ..

Q. He didn't promise to give you such receipt, did he?

A. No, as I said, at the time he approached me with this receipt, that was one of the reasons why I did sign because he said we could arrange something along this line so far as my back rents were concerned, but as I said, nothing has been done as yet.

Q. But he made no promise in consideration of

(Testimony of Robert G. Martin.)

your executing that statement that he would forgive you for any rental he [54] claimed was owed by you?

A. He didn't promise.

Cross-Examination

By Mr. Bunker:

Q. At the time you moved into this apartment, didn't you request extra furniture?

A. Not in the first apartment that I moved into upstairs, which I can't remember, or not in number 9, but in number 7, I did, but that was a different apartment, that was a cheaper apartment.

Q. Down in 7, didn't you have an extra bed for the baby?

A. That bed was already in the apartment when I moved in.

Q. You are referring to Apartment 9?

A. No. I had my own baby cribs in that apartment. They were my own property.

Q. You are now behind for the months of June, July and August?

A. Well, there is a difference there in rent of \$65 and \$75. It is a little confusing. The first of September, as I said before, I paid \$75.

Q. Just a minute, the first of what?

A. First of September, and actually the apartment I am in now is only renting for \$65, and so Mr. Crenshaw said he would apply that on the first month which I failed to pay, which would have been

(Testimony of Robert G. Martin.)

in June, and so actually, I am paid up outright [55] to the first of July as of now.

Q. He didn't, Mr. Crenshaw didn't get tough with you about signing the agreement or anything of that kind?

A. No, he merely asked if I would.

Q. He left you stay there for the three or four months you weren't able to pay?

A. Yes, he didn't force me or try to force me into paying any rent during the time I wasn't able to do so.

Q. He has not tried to evict you in any way?

A. No.

Q. Nor threatened you?

A. No.

Q. You signed that voluntarily?

A. Absolutely.

Q. You figured you had value received from Mr. Crenshaw?

A. I haven't to date, according—as I said before, the thing he mentioned about me being behind in my rent, and he would work something out along that line if I would sign this.

Q. There was no specified sum between you at all, was there?

A. No.

Q. Have you offered to pay any sum whatever for these various months?

A. You mean that I am behind?

Q. Yes.

(Testimony of Robert G. Martin.)

A. No, as I said, I have only been working about a month since [56] the strike was over. I have paid one month's rent since that time, but I haven't been able, I haven't had that much money ahead to make another payment of any kind.

Q. Mr. Crenshaw hasn't demanded it?

A. No. ..

Mr. Bunker: That is all.

The Court: Mr. Martin, when you first rented apartment number 9 from Mr. Crenshaw, what discussion did you have with him as to the rent then?

The Witness: Well, you mean when I actually moved into 9?

The Court: Yes.

The Witness: It was that I was to pay \$75 a month.

The Court: Did you have any discussion with him as to what the maximum rent for that apartment was under the orders of the Rent Director?

The Witness: No, I just took it.

The Court: You accepted that figure as being the figure you had to pay?

The Witness: Yes, sir.

Redirect Examination

By Mr. Knowlton:

Q. Mr. Martin, what do you expect to pay for rent for next month?

Mr. Bunker: Objected to as calling for a conclusion of the witness. [57]

(Testimony of Robert G. Martin.)

The Court: Sustained.

Q. Well, has Mr. Crenshaw advised you your rental will be any other than \$65 a month for Apartment 7 for next month?

A. No, in fact I haven't seen or talked to him for quite some time.

Q. In other words, you paid \$65 last month for Apartment 7?

A. No, as I said before, I paid \$75 because (interrupted)——

Q. You were applying \$10 on back rent?

A. That is true.

Q. But you paid \$65 last month?

A. That's right.

Q. You haven't been informed your rent next month will be any different than last month?

Mr. Bunker: Just a minute; objected to as leading.

The Court: Sustained.

Q. As late as the first of September, Mr. Crenshaw expected you to pay back rent, is that right?

Mr. Bunker: Just a minute; objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

(Witness excused).

L. W. KONECKI

Called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows: [58]

Direct Examination

By Mr. Knowlton:

Q. State your name, please.

A. Leon W. Konecki.

Q. What is your occupation, sir.

A. United States Army.

Q. Where do you reside, sir?

A. Apartment 14, 6 West Babcock, Bozeman, Montana.

Q. Who is your landlord?

A. B. M. Crenshaw.

Q. Would you state how much you are paying for rental for that apartment?

A. I reimburse Mr. Crenshaw a total of \$75 each month.

Q. When you first entered into that apartment, what was your agreement with Mr. Crenshaw as to how much rental should be paid for it?

A. I didn't ask him what the rental on that apartment was until along about the second week in January.

Q. What year?

A. 1948.

Q. Had you paid money before that?

A. No, sir.

Q. What was your agreement when you did enter into an agreement with Mr. Crenshaw?

(Testimony of L. W. Konecki.)

A. The apartment was rented by persons other than myself in [59] advance before I arrived at Bozeman.

Q. Did you have any conversation with Mr. Crenshaw as to what the terms of that rental in that apartment was?

A. Later yes, after we had been there.

Q. When did that occur to the best of your recollection?

A. That second week in January when I made my first payment.

Q. All right. What was that conversation about, what was your agreement?

A. My agreement was, I agreed with Mr. Crenshaw to pay a total of \$75 for the apartment plus improvements he planned to put in, which he has completed.

Q. Did Mr. Crenshaw mention at that time any improvements?

A. I asked him to make improvements in the apartment, and he agreed.

Q. Did you agree with him to pay anything extra for any services which he might give you?

A. We didn't differentiate between rent and services, it was a total sum.

Q. In other words, your agreement was—correct me if I am not correct—to pay \$75 for the use of that apartment.

A. The apartment and all other facilities.

Q. What other facilities did you receive?

(Testimony of L. W. Konecki.)

A. Laundry, use of storage room, and the improvements that go with it, that is, improvements that were added later after we moved in. [60]

Q. What were the improvements?

A. Since we have been there, Mr. Crenshaw has purchased and set a wall-to-wall rug in the living room, furnished a new davenport, two end tables, a telephone desk and chair, furnished the materials and so forth to renovate the kitchen, painted in the kitchen, painted the entire apartment, put linoleum on the floor. In short, the entire apartment has been renovated, and in addition, he has willingly removed some of his furniture so that we might carry our own furniture in the place.

Q. Showing you plaintiff's Exhibit 1, I will ask you whether or not you signed an agreement similar to that?

A. No, sir.

Q. You never signed one similar to that?

A. No, sir.

Q. Did you ever sign any agreement with Mr. Crenshaw?

A. No, sir.

Q. You never signed any agreement with Mr. Crenshaw settling any claim that you may have under Federal law?

A. Let me examine the signature.

Q. I didn't say you signed this one. I asked if you had signed one similar to it?

A. No.

(Testimony of L. W. Konecki.)

Q. You heard Mr. Crenshaw say you did?

A. He was refering to my family, I believe.

Q. Someone in your family signed a statement?

A. Yes.

Q. Were you present at that time?

A. Yes, I believe I was.

Q. Who was it with, your wife?

A. Mrs. Konecki.

Q. What was the conversation, if you know?

A. Similar to the testimony that Mr. Crenshaw gave; it was entirely correct.

Q. Would you state what you paid for rent on the first of September this year?

Mr. Bunker: We object to the question as calling for hearsay; the answer, it is purely hearsay.

Mr. Knowlton: As to what rent he paid the first of September?

Mr. Bunker: Incompetent, irrelevant and immaterial, your Honor, it is a time subsequent.

The Court: Overruled.

Q. How much rent did you pay on the first of September for your apartment?

A. Rental? I don't know how you can figure rent.

Q. How much consideration did you pay for the use of the facilities?

A. Thank you for the clarification. About \$75.

Q. Has Mr. Crenshaw advised you your rental will be any different than \$75 for next month? [62]

(Testimony of L. W. Konecki.)

A. I haven't discussed it with him.

Q. Mr. Crenshaw hasn't so advised you?

A. I didn't discuss it.

Mr. Bunker: Objected to as argumentative.

The Court: Sustained. Answer the question directly. When you can't, if you can't why explain it.

Mr. Knowlton: That is all.

The Court: You have testified, Major, you don't know what you pay for rent, is that right?

The Witness: I know the total amount I pay Mr. Crenshaw.

The Court: You know the total amount you pay Mr. Crenshaw, but you don't know what you pay for rent?

The Witness: No, sir.

The Court: How long has that gone on?

The Witness: Two years, 22 months.

The Court: You don't know whether you are paying \$50, \$60 or \$70 a month rent?

The Witness: For the rent part, no, sir.

The Court: You say you do pay something for these added conveniences. You don't know how much you pay for that?

The Witness: It has never been broken down to my knowledge. I pay a total amount which is very favorable to me.

The Court: You think it is all right?

The Witness: Yes.

The Court: You have never bothered to have an agreement with [63] him as to what your rent is?

(Testimony of L. W. Konecki.)

The Witness: I don't believe that the entire sum could be classified as rent, sir.

The Court: That is what I am trying to find out. The Court is interested in finding out what rent was charged for these apartments, and the Court, you can readily see that the Court is rather astounded to have a person testify that they don't know what they are paying for rent. It is just beyond my experience.

The Witness: Sir, to my mind it is a technicality. The total amount I reimburse Mr. Crenshaw is the only thing.

The Court: What did you understand you were paying Mr. Crenshaw?

The Witness: \$75 for everything.

The Court: For rent?

The Witness: For everything.

The Court: You made no distinction as to how much it was costing you to move his davenport out of your apartment and move your own in, if he charged you \$10 a month for that or \$5 or \$1, you don't know.

The Witness: I carry it all as one lump sum, sir.

The Court: So he may have been charging you \$25 or \$30 a month for that?

The Witness: For the moving?

The Court: Yes. [64]

The Witness: It could be.

The Court: How long have you lived in Apartment No. 14?

(Testimony of L. W. Konecki.)

The Witness: We moved in on the 16th of December, 1947.

The Court: 16th of December, 1947? ..

The Witness: Yes, sir.

The Court: And from the first of July, 1948, until the end of June, 1949, you did pay Mr. Crenshaw \$75 a month?

The Witness: Yes, sir.

The Court: Now, this conversation that was had with reference to a settlement, tell me about that.

The Witness: Mr. Crenshaw approached me—I don't remember the date or the time, it was in the evening—approached me and informed me he was trying to settle the matter out of court, and asked me if I had any claim to make against him. I told him no I hadn't, that I was completely satisfied with the services I had been getting for my reimbursement to him each month. He asked me to sign a receipt at the time. I didn't feel I could sign the receipt. Mrs. Konecki signed the receipt.

The Court: Why didn't you feel you could get involved in it?

The Witness: I didn't want to get involved in it and lose the days from work.

The Court: You mean you didn't want to get involved as a witness in a lawsuit?

The Witness: That's right, sir. [65]

The Court: You didn't realize that because you lived in the apartment, you would become involved as a witness?

(Testimony of L. W. Konecki.)

The Witness: No, sir.

The Court: That you were the one that paid the rent, that didn't enter your consideration?

The Witness: I physically personally do not pay the rent, Mrs. Konecki takes care of it.

The Court: You realize you are responsible for it?

The Witness: Yes, sir.

The Court: You furnish the money?

The Witness: Yes, sir.

The Court: So you pay the rent. Then, you were present when Mr. Crenshaw had the conversation with your wife, were you?

The Witness: The time the receipt was signed?

The Court: Yes.

The Witness: Yes, sir.

The Court: Tell me what the conversation was?

The Witness: Well, the conversation was between Mr. Crenshaw and myself and Mrs. Konecki, as I stated it, sir.

The Court: Just as you stated it was all. Mr. Crenshaw made no promise to you or your wife as to what he was going to do for you in view of your wife signing the document?

The Witness: No, sir.

The Court: He made no promise at all and didn't give you anything at that time? [66]

The Witness: No, sir.

The Court: Did you ever discuss with Mr. Crenshaw the maximum rent authorized by the Rent Director of the Bozeman area?

(Testimony of L. W. Konecki.)

The Witness: No, sir.

The Court: Did you ever know what the maximum rent was?

The Witness: No, sir.

The Court: Did you ever discuss the matter with any of the officers of the Rent Director's office?

The Witness: No, sir.

The Court: Do you know whether or not your wife did?

The Witness: She may have now, I am not sure.

The Court: Did she ever tell you she did?

The Witness: I believe—let me think a minute, sir. I believe I have never talked to anybody in the Bozeman office about it.

The Court: Did you ever talk to your wife about it? Did she tell you about it?

The Witness: About what?

The Court: About the maximum rent fixed for that apartment?

The Witness: I don't believe she knows.

The Court: Did you ever discuss it with her?

The Witness: The rent?

The Court: The maximum rent?

The Witness: In any detail, no.

The Court: Don't evade the Courts' questions. I have to [67] continuously call witnesses' attention to the fact the Court is trying to find out what the truth of the situation is. Don't quibble about whether it was in detail or not. Was the maximum rent of your apartment called to your attention, whether by your wife or by anyone else?

(Testimony of L. W. Konecki.)

The Witness: It wasn't called to my attention by my wife or by any of the officers in the Bozeman District office.

The Court: Was it called to your attention by anyone else?

The Witness: I believe a representative from the Seattle office paid us a visit at one time, and I am not sure whether he informed us then of the ceiling or not.

The Court: When was that visit made to you?

The Witness: I am not sure of the date. I believe Mr. Knowlton can refresh my memory on it.

The Court: Sometime prior to your coming here to Court, did you have any discussion with anyone concerning the maximum rent fixed on your apartment?

The Witness: I don't remember, sir.

The Court: What are your duties in the Army?

The Witness: I am with the Military Department at the College, Montana State College at Bozeman.

The Court: Do you have anything to do with advising the veterans that are there?

The Witness: No, sir.

The Court: You have nothing to do with that? Do you have any [68] responsibility in connection with veterans attending school?

The Witness: The only veterans we deal with are veteran students enrolled in Advanced ROTC.

The Court: Do you have any responsibility with

(Testimony of L. W. Konecki.)

those students other than the teaching of courses?

The Witness: You mean counselling and so forth? No, sir, my capacity is instructor of military subjects.

The Court: Did you know Bozeman was a rental area?

The Witness: Yes, sir.

The Court: You knew there were maximum rents set?

The Witness: Yes, sir.

The Court: Is it just the fact you were just satisfied to have a place to live in and pay whatever you were paying, just satisfied with that?

The Witness: Yes, I was quite happy.

The Court: You didn't care what the rent was?

The Witness: I was quite happy to find a place to live that was adequate.

The Court: So you made no further investigation of your own on the matter?

The Witness: That's right.

The Court: You don't know what rent you pay, though?

The Witness: We are back where we started (interrupted)——

The Court: You don't know that, you never inquired the amount? [69]

The Witness: We carry the entire amount on our household bookkeeping as rent.

The Court: You pay it as rent.

(Testimony of L. W. Konecki.)

Cross-Examination

By Mr. Peterson:

Q. Will you describe to the Court the apartment you occupy, Apartment 14, as to space and rooms?

A. I am not too certain as to the size of the rooms. The apartment consists of a large living room which runs the full length of the apartment. The living room contains a new rug, as I mentioned before, new davenport, two end tables with matching lamps, a coffee table, desk, dining room table and chairs, plus several articles of our own. Of the living room you will find the bedroom, adequately furnished with two dressers, I believe they are called, and a bed, of course, and I believe they are called two chests of drawers and a dresser with lights. Next is the kitchen adjoining the bedroom which contains an electric stove, electric refrigerator, a large number of cupboards and so forth.

Q. Major, assuming the maximum rent of that apartment by the Rent Area Board was \$50, do you feel you were given extra special services in addition to that which would make the reasonable value of this property \$75 a month?

A. Yes, sir. [70]

Q. Isn't it true that these special services which you requested and obtained consisted of a new davenport, telephone desk, chair, new linoleum and a few other things?

A. Exactly.

(Witness excused.)

KATHERINE DAVIS

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Knowlton:

Q. State your name, please.

A. Katherine Davis.

Q. Where do you reside? A. Bozeman.

Q. Where in Bozeman?

A. I am living at the Bozeman Hotel now.

Q. Prior to the time you lived in the Bozeman Hotel, where did you live?

A. At the Crenshaw.

Q. What unit did you occupy in the Crenshaw?

A. 21.

Q. Do you recall when you moved into 21?

A. I think—I don't know, it was June or July.

Q. Of what year? [71] A. Last year, 1948.

Q. Do you recall when you moved out of the Crenshaw Apartments?

A. The 15th of September.

Q. Of what year? A. This year.

Q. Do you recall how much rental you paid while you were there? A. \$75.

Q. Your landlord is Mr. Crenshaw, is he not?

A. Yes.

Q. When you first entered negotiations for the occupancy of this apartment, what was your agreement with Mr. Crenshaw?

(Testimony of Katherine Davis.)

A. I looked at the apartment; I had to have a place to live; he said \$75, and I moved in.

Q. Was there any representation made to you that any part of the \$75 was for anything else but the rental? A. No, rental is all.

Q. Have you signed a statement similar to this?

A. No.

Q. You never have? A. No.

Q. Is there any particular reason why you moved out of the Crenshaw Apartments?

Mr. Bunker: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained. [72]

Mr. Knowlton: That is all.

Cross-Examination

By Mr. Bunker:

Q. You did occupy the apartment between the 1st day of April and the last day of June, 1949?

A. Not in April.

Q. You didn't occupy the apartment in April?

A. Not in April, no.

Q. 1949? A. Oh, in 1949, yes.

(Witness excused.)

LEONE REEVES

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Knowlton:

Q. State your name. A. Leone Reeves.

Q. Is that Miss Reeves? A. Miss Reeves.

Q. What is your occupation, Miss Reeves?

A. I am a stenographer at Montana State College, Bozeman.

Q. Where do you reside, Miss Reeves? [73]

A. Apartment 24, Crenshaw Apartments.

Q. Who lives there with you?

A. My sister, Clarice, lives there.

Q. Anyone else live with you?

A. Not at the present.

Q. How long has that situation obtained, only two of you been there?

A. Last fall Lois Ketterer moved out. She had been living with us.

Q. Before that, you and your sister were there?

A. Yes, the three of us were there before.

Q. When did you move into the apartment, do you recall?

A. I believe the 1st of April, 1948.

Q. You are still there, and your sister?

A. Yes.

Q. But Miss Ketterer hasn't been there since last fall? A. That's right.

(Testimony of Leone Reeves.)

Q. No one else has been there besides your sister?

A. No.

Q. How much have you paid Mr. Crenshaw in connection with your use of that apartment?

A. \$75 a month.

Q. From the beginning? A. Yes.

Q. Up to and including this last month? [74]

A. Yes.

Q. Did you, yourself, negotiate for the renting of that apartment?

A. No, I believe Miss Ketterer did and her mother.

Q. Have you been advised by Mr. Crenshaw that your rental for next month will be different than the rental for last month? A. No.

Mr. Bunker: Objected to as incompetent, irrelevant and immaterial, calling for speculation by the witness.

The Court: Sustained.

Mr. Knowlton: If your Honor please, I think it is proper. Mr. Crenshaw will undoubtedly make representations to the Court that he intends to abide by these regulations, and what is now, I think, good evidence of whether he would follow them is whether he advised the tenants what he intends to collect next month. I only asked this witness what Mr. Crenshaw advised her, whether her rent will be any different next month than it was last.

The Court: Well, when Mr. Crenshaw makes

(Testimony of Leone Reeves.)

such representations, we can ask him what he has done, but I don't see at this point where we have to go into it.

Q. Miss Reeves, do you recall executing an instrument similar to Plaintiff's Exhibit 1? You didn't sign that one, but did you sign one similar to that? A. Yes, one similar. [75]

Q. You, yourself, did that? A. Yes.

Q. When did you do that?

A. Toward the last part of last month; I don't remember the date.

Q. Of last month? A. August.

Q. August? A. Yes.

Q. What was the conversation had between Mr. Crenshaw and yourself? Is that who you conferred with?

A. I had no conversation with him. He had brought it to the apartment while I was on vacation and given it to my sister. She gave it to me.

Q. Did your sister sign it, do you know?

A. No, I signed it.

Q. All you know is you found this when you got back and you signed it?

A. He had told my sister he hoped to settle the claim out of court and if we had no complaint, he would like to have it signed, and I signed.

Q. So far as you know, there was no consideration given for your signature on the instrument similar to that?

A. No, none in the future.

(Testimony of Leone Reeves.)

Q. What past consideration have you received? [76]

A. He has put in every piece of furniture we have asked for and made minor repairs we have asked for to our complete satisfaction.

Q. Is the furniture he put in more than you would ordinarily expect in an apartment?

A. It is more than you ordinarily find in an apartment.

Q. Upon the placing of additional furniture in the apartment, did you have any agreement that part of the money you paid him was for such additional furniture?

A. Not at the time he put it in.

Q. Did you have any such agreement at any other time that you recall?

A. No. However, I hadn't had any conversation with Mr. Crenshaw regarding the rent.

Cross-Examination

By Mr. Peterson:

Q. Do I understand that just you and your sister are occupying the apartment at this time?

A. Yes, we are.

Q. How many rooms are there in the apartment?

A. There is a large front room, kitchen, bedroom, bathroom or bath.

Q. How was the kitchen furnished when you entered as a tenant? What additional accommodations are there in there now? [77]

(Testimony of Leone Reeves.)

A. Electric refrigerator and electric stove.

Q. What kind of a refrigerator is it? Is it a General Electric?

A. I don't know. Then, there is an electric stove, table, chairs, cupboards and a small utility cupboard.

Q. Is there a sitting room? A. Yes.

Q. Living room? A. Yes.

Q. How is that furnished?

A. At the present there is a new couch, new end tables and a coffee table. There is a desk and two large chairs, lamps and the radio stand, magazine stands and the small pieces.

Q. Now, assuming that the maximum rental—I understand you are paying \$65 or \$75?

A. \$75.

Q. Assuming that the maximum rent here as authorized by the Rent Control is \$65, would you express an opinion that the additional services furnished here, the additional equipment installed would be \$10 a month?

The Court: Just a minute. The Court will on its own motion object to the question and sustain my own objection to it. Her opinion as to that makes no difference.

Mr. Peterson: Very well, I'll withdraw the question.

Q. (By Mr. Peterson): Is it a fact that at your request you received additional [78] furniture in the apartment after you moved in? A. Yes.

Q. I believe that included a new davenport and some other articles? A. Yes.

(Testimony of Leone Reeves.)

Q. Those were in addition to the regular rent?

A. I don't quite understand.

Q. Were they included in the regular rent?

A. They were put in after we had already rented the apartment.

Q. They were something extra?

A. They were extra.

The Court: The rent you paid before those new couches and other things were put in was the same, though, you paid \$75 rent for the apartment?

The Witness: \$75 rent.

The Court: When it was poorly furnished, just as you do now when it is newly furnished?

The Witness: It was not poorly furnished.

The Court: It was always furnished?

The Witness: Yes.

The Court: And you paid \$75 a month?

The Witness: Yes.

Q. (By Mr. Peterson): Was the original agreement of \$75 made with you or Miss Ketterer? [79]

A. I believe it was with Miss Ketterer's mother, Mrs. Ketterer.

Q. Is it a fact that when you came to the place, you stated to Mr. Crenshaw in substance, "I will pay \$75, providing you give me this additional equipment." Was anything said like that?

A. I had no conversation with him to that effect. However, when we asked (interrupted)——

The Court: Just a minute, you can't recite any conversation anyone else had with him. You can recite what you did.

(Testimony of Leone Reeves.)

A. I had no conversation with him.

Q. How did it happen this extra equipment was put in?

A. I asked him to put it in.

Q. And you said in substance, "If I take this apartment, I will pay" (interrupted)——

The Court: She testified at the time she moved in the apartment she had no conversation with Mr. Crenshaw, but at a later date she asked him to move some extra furniture in. You can ask when the conversation was and what it was, when it took place, but it didn't take place when she moved in.

Q. When did the conversation take place between yourself and the landlord about extra equipment?

A. It has been at various times since my occupancy.

Q. How soon after the occupancy, or how soon after that?

A. I would say part of the equipment was put in about a month after we moved in and from time to time we have asked for things and received them. [80]

Q. When did you request them?

A. We requested the end tables and coffee table and new couch, chest of drawers and some small articles, twin lamps.

Q. When was that?

A. I couldn't state the exact time. That has been at various times.

(Testimony of Leone Reeves.)

Q. Has your requesting and the furnishing of this extra equipment been a consideration for your remaining as a tenant? A. No.

(Witness excused.)

Mr. Knowlton: Plaintiff will rest.

The Court: Very well, Court will stand in recess for 15 minutes so counsel may have an opportunity to confer.

(15-minute recess.)

The Court: Very well, the defense may proceed.

B. M. CRENSHAW

Defendant, called as witness in his own behalf, having previously been sworn, testified as follows:

Direct Examination

By Mr. Peterson:

Q. Your name is B. M. Crenshaw?

A. Yes, sir.

Q. You are the defendant in this action?

A. Yes, sir. [81]

Q. Mr. Crenshaw, you have heard the testimony here of the witnesses this afternoon, a number of your tenants, have you not? A. Yes, sir.

Q. Now, with reference to the apartment occupied by R. G. Martin, you heard Mr. Martin's testimony? A. Yes, sir.

(Testimony of B. M. Crenshaw.)

Q. Has he been an occupant of your housing accommodation there at Bozeman?

A. Yes, sir.

Q. Which apartment did he occupy?

A. He occupies No. 7 at the present time.

Q. You rent that apartment to him?

A. Yes, sir.

Q. And were there any extras in connection with that apartment in addition to the regular furnishings?

A. He asked for double-decked bed for the two children and I have it in the hall to put in when I get home.

Q. As a matter of fact, how much have you collected from him, if you know?

A. I would have to figure it up, he is behind two or three months.

Q. Have you threatened or ordered him out or attempted to evict him?

A. I never have, in the 10 years I have been in there, threatened [82] to evict anyone.

Q. So far as your charge for that apartment is concerned, Mr. Crenshaw, have you acted in good faith to the rental area authorities and also to your tenants?

Mr. Knowlton: Object to the question because it calls for a conclusion of the witness.

The Court: Read the question.

(Question read back by the reporter.)

The Court: Yes, that is a matter for the Court to

(Testimony of B. M. Crenshaw.)

decide whether or not he is acting in good faith, but he can tell the circumstances under which he did act, from which the Court may or may not draw the conclusion.

Q. Very well, your honor. What is the status of the relationship of debtor and creditor between yourself and the tenant at this time, if you know?

A. About three months behind.

Q. For that apartment, at his request, have you furnished any extras?

A. When the other tenant moved out the first of April, I had to put in davenport, rugs, beds, and different things.

Q. You say the first of April. That is the first of April, 1949?

A. Yes, Mr. Crudy moved out when the old law went out.

Q. For these extras how much did you charge him?

A. I am charging him \$65 a month at the present time. [83]

Q. How much for the extras? How much did you charge over and above the regular rental, if you charged anything for these special furnishings?

A. I was collecting \$42.50 from Crudy. I put in the extra furniture and all that and I am getting \$65 for it now, that is, when he pays.

Q. How about 9?

A. He moved out of 9 into this one.

Q. Were there any extra furnishings for number 9?

(Testimony of B. M. Crenshaw.)

A. I wouldn't know how to remember, that is too far back.

Q. Do you know how much you charged him for number 9? A. I think it was \$75.

Q. How was that apartment furnished?

A. It had a davenport, rug and bed and those things you put in a bedroom.

Q. How long was he in number 9?

A. I wouldn't know.

Q. Was he in there from about December 1 to March 1st?

A. He moved along in the fall into one apartment and he stayed until he got one of the others, and then he moved down there. Then, he liked number 7, so he moved over in 7.

Q. Did you ever order him out for not paying rent? A. No, sir.

Q. Did you furnish him with all the accommodations which he requested? [84] A. Yes, sir.

Q. Did you hear the testimony of Major Konecki? A. Yes, sir.

Q. Which apartment does he occupy?

A. Number 14.

Q. What does he pay? A. He pays \$75.

Q. Did you hear the testimony of the Major when he said at his request, you furnished him with certain furniture? A. Yes, sir.

Q. What was that?

A. Davenport, rugs, built extra built-in cupboards, coffee tables, a big mirror, anything that he would ask for, he got it.

(Testimony of B. M. Crenshaw.)

Q. And was a part of your charge of \$75 for this additional service?

A. Everything, yes, sir.

Q. How much would you say for the additions; how much extra per month was included in that \$75, if you know.

A. I didn't know what the area rent was until the day before yesterday.

Q. Would you say it was as much as \$25 additional? A. It was worth more than that.

Q. How much more?

A. I wouldn't know, \$5 or \$10. [85]

Q. How much did you pay for these articles you put in there at his request?

A. Somewhere like \$350.

Q. Did you hear the testimony of Kathay Davis?

A. Yes, sir.

Q. Which apartment does she occupy?

A. 21.

Q. Did you give her any extra consideration in the way of furnishings in her apartment?

A. I had a hired man to clean her rug.

Mr. Knowlton: I didn't get that.

A. I had a hired man to clean the rug.

Q. Anything else? A. That is about all.

Q. You heard the testimony of the witness, Miss Reeves, who occupies 24? A. Yes, sir.

Q. According to the exhibit attached to the complaint, it shows there are two occupants there, L.

(Testimony of B. M. Crenshaw.)

Reeves and L. Ketterer. The testimony of Miss Reeves was to the effect that Miss Ketterer had moved out. What is the charge for that apartment? A. \$75.

Q. Was there any extra furniture you put in a part of that \$75.

A. At her request, I put in a new davenport, coffee tables, [86] end tables, an extra chiffonier, or whatever you call them with those five drawers in them; and I forget what else.

Q. Was the \$75 which you charged for that apartment of Miss Reeves', was any part of that for additional services you rendered?

A. Yes, sir.

Q. How much? A. \$10.00.

Q. Calling your attention to Apartment 8 of your apartment house, Mr. Crenshaw. There is evidence here that was occupied by W. H. Westfall, is that a fact? A. Yes, sir.

Q. What charge was made for that?

A. \$75.

Q. Was it collected? A. Yes, sir.

Q. Is that apartment similar to the other apartment? A. Those 18 in there are all the same.

Q. Was anything extra furnished to Westfall as part of the consideration for the \$75 rent?

A. I had to get some extra dressers and a bed for the extra person.

Q. Describe that in detail.

A. He was there only about five weeks. They was short tenants.

(Testimony of B. M. Crenshaw.)

Q. Did you move any of your stuff out and put his stuff in? [87]

A. I moved it all in, none out.

Q. And for that payment you made an extra charge, or for that service? A. Yes, sir.

Q. How much was the value of that?

A. That would run about \$15.

Q. Calling your attention, Mr. Crenshaw to Apartment number 20, which it is alleged was occupied during the period on question by V. Cameron, what was the charge for that apartment?

A. \$75.

Q. Was there anything extra put in there as part of the consideration?

A. He just wanted it indefinitely. He didn't know whether he wanted it for a month or five weeks or six weeks.

Q. What did you rent it to him, by the week or month?

A. It was rented for \$75 a month or two and a half a day, anyway he took it.

Q. Apartment No. 17, I think there is no evidence here in the case, except possibly what was gotten from you on cross-examination under the statute. R. H. Henke, was he your tenant in 17?

A. He is the same one as mentioned in the other suit.

Q. What did you collect from him?

A. \$55 a month.

Q. What was that for? [88]

(Testimony of B. M. Crenshaw.)

A. Rent and storage of the furniture. I had to take my stuff out and put in his davenport and other stuff just like I mentioned yesterday.

Q. That transaction called for removing your furniture and putting in his? A. Yes, sir.

Q. What inconvenience were you put to, or expense in the way of taking that furniture out and storing it? Where do you store it?

A. I had to take it out myself.

Q. Where is it stored?

A. In the trunk room.

Q. Is that space which is an expense to you?

A. It is worth something.

Q. How much?

A. I get the same rate as they do in the storage houses.

Q. Do you feel that the service and charges and treatment that you gave to these tenants were fair and equitable, Mr. Crenshaw? A. Yes, sir.

Q. Has it been your policy or your intention throughout your transactions as a landlord during the period when the rent law has been in effect to abide by the regulations?

A. Just as far as I possibly could.

Q. Have you endeavored to do that? [89]

A. Yes, sir.

Q. Are you endeavoring to do it now?

A. I am.

Q. I understood you to say you had filed something like 41 petitions on form D-1 for an adjustment of rents on the property in question?

(Testimony of B. M. Crenshaw.)

A. Yes, sir.

Q. Upon the final determination of these matters, will you abide, do you intend to abide by the orders made? A. I will.

Q. Will you act in good faith? A. Yes, sir.

Mr. Peterson: That is all.

Cross-Examination

By Mr. Knowlton:

Q. Mr. Crenshaw, have you ever advised any tenant in connection with these apartments that you intend to go back to those rents, or advised them their rent will be any less than they paid last month?

A. I can't give them any advice until I get the papers back.

Q. In other words, until you get those back from the office, you intend to charge just exactly what you have been charging?

A. I am going to charge just what he says.

Q. Who says? [90]

A. The applications when they come back. If they say \$25 a month, that is what I will charge.

Q. Suppose they don't come back until the 15th of next month, how much will it be the first?

A. It will be the same as today, I don't intend to change them. The order says seven days. They out to be back by the first.

Q. You mean if you don't get the orders back by the first of the month giving you the increases which you think you are entitled to, you intend to

(Testimony of B. M. Crenshaw.)

charge Mr. Konecki the same as you have been charging him?

Mr. Bunker: Objected to as calling for an opinion of the witness, not within the province of the witness.

The Court: Overruled.

Q. Do you intend to charge Mr. Konecki \$75 next month in the event you don't get your order by that time?

A. I will have to. I don't know what to charge. If I don't have the amount to charge, how can I charge anything else?

Q. In connection with the various services and facilities you have granted tenants in connection with their use and occupancy of the various units, you, of course, established your own rates for those services, didn't you?

A. Who else would if I didn't?

Q. Without any regard to an application to the rent office?

A. I couldn't get anything back from the office.

Q. Do you intend to charge for services above any order the Rent Director might make in the future?

A. No, sir, I told you that a dozen times.

Q. If he sets Apartment 9 at \$50 a month, do you intend to rent it for \$50 and \$10 more for the cot you put in there for the tenant's baby?

A. No, sir, it will be set by the Director's order.

Q. Why did you do it before?

(Testimony of B. M. Crenshaw.)

A. You have to get money for upkeep.

Q. You, yourself, never bothered to find out what your rents were?

A. My lawyer has dozens of times?

Q. I asked you if you have, sir?

A. No, sir.

Q. You have made no inquiry at the office since you first registered? A. Not me.

Q. You have rented your apartments for much more in many cases than you first registered?

A. Yes, sure, I ain't going to lie about it, it is of record.

Q. But you again deny you ever received any of these orders, is that correct?

A. I have never received them. I have seen copies of some of them.

Q. In a couple of cases? [92]

A. I saw two. When I seen that copy, it dumb-founded me. I didn't know they could issue an order without my consent.

Q. Even though you received no orders, for quite awhile you raised your rents over and above what you registered them at?

A. We agreed. I didn't think anybody would object if you and I agreed. We traded horses there and anyone else would.

Q. As a matter of fact, you have never broken down with the tenants the charge for rent and the charges for the extra facilities you say you gave them?

(Testimony of B. M. Crenshaw.)

A. One would want one thing and another another thing.

Q. Just give me a case where you agreed with your tenant that the apartment was \$50 and the service \$10.

A. Henke there. He was paying \$50. He wanted this extra, and when he got it, I told him it would be \$5 extra.

Q. How about the others?

A. Some of the others were practically the same way. With 41 of them, I can't keep track of them all.

Q. As a matter of fact, isn't it a fact that you offered a lot of those apartments for \$75 across the board?

A. Yes, sir.

Q. When you so rented them, you made no differential between services and rent?

A. There is no differential there when the furniture is all put in.

Q. When you first registered the property, did you ever register [93] any of them for \$75?

A. Not at that time, that was three years ago.

Q. It has been your practice in most apartments to charge \$75?

A. Whenever I put furniture in there and they wanted it and I don't know what the rent is, I am going to get it. I have 31 \$75's and 10 \$55's. That is for service. I don't stutter when I tell them what it is. I don't force them to pay it. In fact, that is the first question I will ask you if you come in

(Testimony of B. M. Crenshaw.)

wanting an apartment. I will say, "Mr. Knowlton, can you afford \$75 for an apartment?" I have them on the waiting list. Some say "No, have you got one for \$55?" Why should I talk there in my apartment and talk different in the courtroom. That is what I want you to know and what I want the Rent Director to know. Why don't they come in and tell me, come in there like whitemen and not run to the doors disturbing the peace of my tenants. I am right on top of them.

Q. Didn't this alleged disturbance occur shortly after, around June, 1946?

A. Somewhere along in there.

Q. Isn't that shortly after the time both you and Mr. Bunker requested the rent office to inspect your property?

A. I wouldn't know all that. That is too far back for me.

Q. Well, you heard Mr. Bunker testify in connection with the other matter that he asked the Rent Director to inspect the [94] property?

A. Yes, he asked him all the time.

Q. Were you present when he asked them? Did you know he asked them?

A. One time I was in his office.

Q. Was that the time when you were up there registering your property that you wanted someone to inspect them?

A. That was when we first registered.

Q. Didn't you, at that time, ask to have them inspected?

(Testimony of B. M. Crenshaw.)

A. I told them these prices couldn't prevail forever and we wanted them adjusted.

Q. Then, when the inspectors came out to look at your apartment, you threw them out?

A. I didn't know they were inspectors. They might have been drunks. When this woman told them to get out of there, she didn't want them bothering her, that is when Crenshaw took hold, and he will do it again. Listen, Mr. Knowlton, I am running that apartment. That apartment is mine. I have some of the best tenants in the United States in those apartments. Crenshaw will give his life for them. He isn't going to have drunks knocking on doors. If they open the door and say, "get out," he will put them out.

Q. Are you claiming those gentlemen there were intoxicated?

A. No, I wouldn't know whether they was or not. When the woman told them to get out, that is when I went back to my [95] apartment to get the stuff to put them out, the stuff to prepare to put them out. When two double up, I am all set. I can handle one pretty good, but when two double up, I am going to be prepared.

Q. You say you are running that apartment, you are the owner of it practically speaking?

A. Yes, sir.

Q. You are going to run it the way you want to?

A. That much of it. I have done told you I was going to comply with this new rent directive we

(Testimony of B. M. Crenshaw.)

get, these new applications. These are the first ones I ever had, the first ones ever presented to me to be signed. If he says one apartment is one price and one another and one another, and all three adjoin, that is what I am going to stand by for the next nine months until this is over with. Those 18 apartments in the gym, there isn't a quarter of an inch difference in them. There might be some little difference in the value of this furniture or that. I have a waiting list of my former tenants for these apartments. I got a letter day before yesterday wanting an apartment, wants it when it is available. They said we will take a bachelor girl apartment. I have a family of four in a bachelor apartment right now waiting for a ground floor apartment. I don't take anybody on the ground floor unless they got children. If they have 14 children, I will give them rent free.

Q. How many people with 14 children have you rented your [96] apartments to?

A. Not one. There is 14 in my family. That is the reason I will give them rent free, and I will help to feed them and clothe them, too.

Court: Did I understand you to say you have these apartments for \$75 rent, that is what you charge for them?

Witness: Yes, sir.

Court: You don't consider any extras, anything else? It is \$75 a month for those apartments?

Witness: After these things go in there.

(Testimony of B. M. Crenshaw.)

Court: That is when you charge \$75?

Witness: Yes, sir.

Court: Let's talk about Apartment number 24. You charge \$75 a month rent for that?

Witness: Yes, sir.

Court: You put in a new couch, some dressers and one thing and another, and if they want anything more, they will get it and you will charge them some more money?

Witness: No, sir.

Court: Why not?

Witness: That is as high as I will go. If they want more than that price, they will not get it. I am not going to charge this one here \$80—your Honor, from 6 to 28, see, there is 18 apartments in there. Over here in this corner there is three with no windows in them. They go for \$35 a month. That [97] is one that Brother Akin is in. I charge him \$35. These others are all \$75. There is no difference. I laid them out myself.

Court: They are all furnished apartments that you rent for \$75 a month, is that right?

Witness: Yes, sir.

Court: When you rented Apartment number 24 to Miss Reeves and Miss Ketterer, the rent was \$75 a month, wasn't it?

Witness: No, it was \$65 and they requested this extra furniture. I says, "I will put the extra furniture in and I will rent it for \$75."

Court: Your testimony, then, now is that you rented it for \$65 a month?

(Testimony of B. M. Crenshaw.)

Witness: At that time.

Court: At the time Miss Reeves moved into the apartment, it was \$65 a month?

Witness: Yes, I gave them extra stuff and then charged them \$75.

Court: Wasn't it a furnished apartment when you rented it for \$65?

Witness: It was. I told them it was furnished, but it wasn't the best, and if they requested any of this other, I would put it in.

Court: It was a furnished apartment when you rented it to Miss Reeves and Miss Ketterer, was it?

Witness: Yes, sir.

Court: You rented it for \$65 at that time?

Witness: Yes, sir.

Court: You put some more furniture in it and charged \$75?

Witness: Yes, sir.

Court: When did you start charging \$75?

Witness: About two months afterwards.

Court: Then, she was wrong when she testified it was \$75 from the start?

Witness: She must have been.

Court: With reference to Apartment 14, was that \$75 right from the start?

Witness: Yes, sir, that was \$75.

Court: And so when did you put the new rug in there?

Witness: That has been quite awhile ago, about six or eight months ago. The new davenport was last year.

(Testimony of B. M. Crenshaw.)

Court: The new rug had nothing to do with you charging \$75 a month rent for it, did it? That was put there after you had been charging \$75 a month rent for sometime, isn't that true?

Witness: I told him I would put it in when I got to it.

Court: It was a furnished apartment, wasn't it?

Witness: It wasn't the best.

Court: You are going to have to re-furnish all the apartments as time goes on? [99]

Witness: Yes.

Court: You are going to have to do that as time goes on. Every time you do that, are you going to raise the rent?

Witness: No, sir. I want to get enough out to buy stuff when this wears out.

Court: With reference to Mr. Martin in Apartment 9, that was a furnished apartment when you rented it to him?

Witness: It wasn't the best in the world.

Court: But you charged him \$75 a month for it, didn't you?

Witness: I am quite sure I did.

Court: So, the rent you charged didn't have anything to do with extra service, did it?

Witness: Not with number 9.

Court: With reference to Miss Davis' apartment, that was a furnished apartment?

Witness: Yes, sir.

Court: You charged her \$75, didn't you?

(Testimony of B. M. Crenshaw.)

Witness: Yes.

Court: There wasn't anything you added later that caused you to raise the rent?

Witness: I didn't raise it.

Court: No, it stayed \$75 all the time?

Witness: That's right.

Court: Your rent for the furnished apartments is \$75? [100]

Witness: Yes, it is now.

Court: And for sometime back?

Witness: Yes, sir.

Court: How long back?

Witness: I don't know, you would have to look at the receipts.

Court: You have talked about your willingness to abide by the orders of the Rent Director, is that right?

Witness: Yes, sir.

Court: Do you now know there is an order covering Apartment 7 fixing the maximum rent at \$42.50 per month?

Witness: I didn't know that was ordered.

Court: Do you now know it? Do you have the order here?

Mr. Knowlton: That was on stipulation.

Court: It has been stipulated by counsel that it was ordered.

Witness: That is what I have been collecting.

Court: \$42.50 for 7?

Witness: Yes, sir.

(Testimony of B. M. Crenshaw.)

Court: I thought you were charging Mr. Martin \$65 in there now.

Witness: Your honor, Mr. Crudy, I asked him to move a year before he did.

Court: Are you charging Mr. Martin \$65 a month for Apartment 7? [101]

Witness: Yes, sir.

Court: Do you understand there is an order that puts a maximum rent on that of \$42.50?

Witness: Yes sir.

Court: You now intend to charge \$42.50, is that right?

Witness: No. May I explain?

Court: Did you say "No"? Just answer my question. You can explain afterwards. Answer my question. Do you now intend to charge \$42.50 for that apartment?

Witness: No, sir.

Court: Why not?

Witness: Because When Crudy moved out, his mother took the bed, rug, and davenport. He was in there for three years. I took that over from his mother when he was down in the South Pacific.

Court: Does the order covering Apartment 7 cover it as a furnished apartment?

Mr. Bunker: If it does, it was a mistake.

Court: All right, let's proceed to another apartment. Let's take apartment 24.

Witness: You passed on that. That is the Reeves apartment.

(Testimony of B. M. Crenshaw.)

Court: Tell me this: Apartment 24 is a furnished apartment?

Witness: Yes, sir. [102]

Court: Do you now know there is an order fixing the maximum rent on that furnished apartment at \$65 a month?

Witness: Yes, sir.

Court: Do you now intend to just charge \$65?

Witness: No, I am charging \$75.

Court: You don't intend to charge that now, do you?

Witness: Until the Rent Director changes it.

Court: Until he make the other order, you don't intend to follow the order that is now in force?

Witness: If I have to, that is what I will do.

Court: That is just what the Court is determining here; and from the conversation, the testimony you are giving, I will advise counsel that if he will prepare a temporary restraining order pending the final determination of this case, I will sign it.

Mr. Peterson: May I ask one question?

Court: Yes.

Mr. Peterson: Mr. Crenshaw, will you abide by the advice of your counsel as to what the maximum charges shall be by you on these apartments until an adjustment is made?

Witness: If somebody, if the Judge or my counsel will give me a list of 1 to 41, if this one is \$5 and this one is \$10, and the Court, if he says that is what you pay, I will start and refund the over-

(Testimony of B. M. Crenshaw.)

charge and abide by that order. If I can get a list. I have to have something to work from. [103]

Court: There is a list in this case, and your attorney will give it to you. There is a list here, and the order is that you abide by that.

Witness: I will give you my word of honor, I will do that.

Court: In the meantime, you have got an appeal for a reconsideration of what those rents shall be. What is it? You have filed petitions for reconsiderations of those, but pending that, you are bound by the orders that are now in force.

Witness: Absolutely.

Court: And those orders fix these rents at various amounts.

Mr. Bunker: May it please the Court, may I say this: There are 10 or 11 new apartments.

Witness: All from 28 to 41 is new. From 28.

Mr. Bunker. There are 13. They are not regularly registered, your Honor. They have been made out of single rooms, made into 4-room apartments with a bath, and they are as good as the best apartments in the house, and some are better, and we have no price on those. What do we do?

Court: Does the Act require to register those?

Mr. Bunker: Perhaps counsel will tell us.

Mr. Knowlton: I don't know what the situation is. If what Mr. Crenshaw did in connection with the apartments that he has mentioned on the upper floor was to convert them so [104] that they resulted

(Testimony of B. M. Crenshaw.)

in additional housing accommodations, why there is a possibility as to those apartments, he might not be subject to control. I have never been there.

Court: It ought to be easier to get there and determine that. I am not worried about those. I am going to say this: that if it is necessary, I will issue a restraining order. I don't think it is necessary. Counsel assures me from this point on the orders will be followed, at any rate, so I will accept that, and I don't think it is necessary to issue a temporary restraining order at this point.

Witness: I will give you my honor, too.

Court: Continue with any further questions.

Mr. Peterson: That is all.

Court: Is there any other evidence?

Mr. Knowlton: No.

Court: Very well, I think you can file your proposed findings and conclusions in this case simultaneously with the other case. It involves generally the same kind of work.

Mr. Peterson: I was going to suggest that we might have five days longer on this case than the other case. I believe your Honor granted us 15 days on the first case.

Court: Very well, 20 days for this. You will file simultaneous briefs, that is, within 20 days each of you must file your proposed findings and memorandum, and you will have 10 days after the service on you to submit further memoranda to [105] the Court. Very well, file your briefs and proposed

findings, and the Court will consider the matter. Court will stand in recess until the further business of the Court requires it to again resume. [106]

Reporter's Certificate

United States of America,
State of Montana—ss.

I, John J. Parker, do hereby certify that I am the official Court Reporter in the above entitled court; that the foregoing transcript is a full, true and correct transcript of the proceedings had and the testimony taken in the cause of United States of America, Plaintiff, vs. B. M. Crenshaw, defendant, being Civil Cause No. 444 in the Helena Division of said Court, tried before the Honorable W. D. Murray, United States District Judge, sitting without a jury, at Butte, Montana, on the 26th and 28th days of September, 1949.

Dated this 12th day of April, 1950.

JOHN J. PARKER,
Official Court Reporter.

[Endorsed]: Filed April 15, 1950.

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable The United States Court of Appeals for the Ninth Circuit, that the foregoing two volumes consisting of 116 pages, numbered consecutively from 1 to 116 inclusive, constitute a full, true and correct transcript of all portions of the record in case No. 444, United States of America vs. B. M. Crenshaw, required to be incorporated therein by designation of the appellant, as the record on appeal therein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Eleven and 90/100 Dollars (\$11.90) and have been paid by the appellant.

Witness my hand and the seal of said court at Helena, Montana, this 26th day of June, A. D. 1950.

/s/ H. H. WALKER,

Clerk U. S. District Court,
District of Montana.

[Endorsed]: No. 12602. United States Court of Appeals for the Ninth Circuit. B. M. Crenshaw, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed July 10, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

12602

B. M. CRENSHAW, (Defendant),
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT WILL RELY AND DESIGNATION OF RECORD FOR CONSIDERATION ON APPEAL

To the Clerk of the Above-entitled Circuit Court of Appeals, and to the Attorney for the United States of America:

You and each of you will please take notice that B. M. Crenshaw, the Appellant in the above-entitled

action will rely on the following points in the Appeal in the above-entitled case, to-wit:

(1) That the Housing and Rent Act of 1947 (50 U.S.C.A. 1881-1906) and P. L. 31, Eighty-first Congress, first Session and particularly the Local option provisions of the Act, 204 (J) 1, 2, and 3, is unconstitutional and void.

(2) That the trial Court erred in denying Appellant's motion for dismissal upon the grounds that the Court had no Jurisdiction.

(3) That the evidence is insufficient to sustain the trial Courts' findings and the judgment therein.

(4) The Trial Court erred in finding that the Appellant, Crenshaw, as landlord, had received notice of rent orders establishing maximum rent, upon which the judgment was passed in that there was lack of definite proof that any authorized personnel of the Bozeman Rent Office or any other authorized Rent Office and having mailed such notices, and there was testimony of Appellant that notice of rent orders were to be sent to his attorney and that both, appellant and his attorney, denied that either had received notice of rent orders from any rent office.

(5) The Trial Court erred in refusing to recognize contracts for extra service and extra equipment provided at tenants requests over and above those required by the rental orders.

(6) That refusal to recognize such contracts for extra service and equipment were an impairment of

of the right to contract and the judgment of the Trial Court were passed upon unconstitutional provisions of the law and orders thereunder.

That the Record, upon which this Appellant is taken is the record of pleadings and evidence, orders, rulings, and findings, certified and transmitted by the Clerk of the United States District Court for the District of Montana, and the Exhibits used in the case and transmitted by order of the Judge of said Court.

/s/ E. F. BUNKER,

/s/ E. A. PETERSON,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 10, 1950.

No. 12602

IN THE
United States
Court Of Appeals
For the Ninth Circuit

B. M. CRENSHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief Of Appellant

Upon Appeal from the District Court of the United States
for the District of Montana.

EUGENE F. BUNKER,
ERNEST A. PETERSON,
Attorneys for Appellant,
Bozeman, Montana.



BOZEMAN CHRONICLE PRINT

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No. 12602

IN THE

United States
Court Of Appeals

For the Ninth Circuit

B. M. CRENSHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief Of Appellant

Upon Appeal from the District Court of the United States
for the District of Montana.



Statement of Pleadings

Complaint.

The action is brought in the name of the United States of America, and pursuant to the Housing and Rent Act of 1947, as amended (50 U.S.C.A. 1881-1906 and P.L. 31, 81st Congress, 1st Session). In the Complaint it is alleged that jurisdiction is conferred by Section 205 and 206(b) of the Act and Title 28 U.S.C.A. 1345 (Tr. 2).

The Defendant, Crenshaw, of Bozeman, Montana, landlord and operator of a certain controlled multiple unit housing accommodation at Six West Babcock Street, Bozeman, Montana, has rented and offered for rent such housing accommodations; that in the judgment of the Housing Expediter the Defendant has engaged in acts and practices which constitute a violation of Section 204 of said Act in that Defendant has charged the persons named in Schedule "A", for the periods when maximum rentals were established, amounts which were more than that set forth in said schedule and which resulted in the overcharges therein computed; that more than thirty days have expired and that none of the persons so charged have commenced any action therefor against the Defendant pursuant to Sec. 205 of the Act; that the overcharges alleged in said Schedule "A" amount to \$1,082,50, and Plaintiff prays for a temporary injunction and for an Order directing the Defendant to pay those persons who have been charged rentals in excess of the maximum, sums as follows:

Name	Amount
C. A. Labbe	\$ 45.00
W. H. Westfall	50.00
R. G. Martin	175.00
L. W. Konecki	300.00
V. Cameron	25.00
K. Davis	325.00
L. S. Mann	37.00
(L. Reeves	
(L. Ketterer	120.00
R. H. Henke	180.00
	<hr/>
	\$1,257.00

and for treble damages and for such other and further relief as to the Court may seem just and equitable (Tr. 2—5).

Answer.

The Defendant's Answer admits the action is brought in the name of the United States and under the pursuant to the Rent Act of 1947 as amended and as Plaintiff has alleged in Paragraph I of the Complaint (Tr. 7); denies each and every allegation of Paragraphs II, IV, V, and VI of the Complaint and particularly that jurisdiction is conferred, and denies that Plaintiff's rental operations have resulted in overcharges as alleged or at all (Tr. 7). In Paragraph III of his Answer and as a further and separate defense, Defendant alleges that said laws and acts described in Paragraphs I and II of said Complaint are unconstitutional and do not confer jurisdiction and that the acts therein referred to, violate and are repugnant to the due process clause of the Fifth Amendment of the Federal Constitution.

The cause came on for trial September 29, 1949, at Butte, Montana, the Honorable W. D. Murray, United States District Judge presiding, without a jury, and certain facts having been stipulated by the parties and evidence both oral and documentary having been introduced, the Court found that the Defendant has charged persons in excess of the maximum rents established under and pursuant to the Housing and Rent Act of 1947, as amended, for housing accommodations at Bozeman, Montana, to-wit:

Name	Amount
C. A. Labbe	\$ 45.00
W. H. Westfall	50.00
R. G. Martin	175.00
V. Cameron	25.00
K. Davis	325.00
R. H. Henke	180.00
L. W. Konecki	360.00

Accordingly judgment was entered and the Defendant was ordered to pay the sum of \$1262.50 to the Treasurer of the United States.

STATEMENT OF THE CASE

At the opening of the trial herein, Defendant moved for dismissal of the Complaint for want of jurisdiction of the Court over the subject matter (Tr. 24) which motion was by Court overruled (Tr. 35).

Pursuant to stipulation in this case it was agreed that rent orders had been made and issued affecting the housing accommodations concerning which the Plaintiff contends there were overcharges, but Defendant maintains he did not receive notices of such rent orders; moreover

he is entitled to extra charges for furniture and furnishings supplied to tenants where the Court found there had been an overcharge. Lists of such furnishings as requested by tenants involved is found in Defendant's testimony (Tr. 81—103).

SPECIFICATIONS OF ERRORS

1. That the Housing and Rent Act of 1947, as amended, is unconstitutional and void.

Preamble to the Act of 1949 is to be found in Section 201 (a) and (b) of the Act of 1947 which are carried forward into the Act of 1949. This preamble declares the policy of Congress under the heading "Declaration of Policy" in the following language:

"(a) The Congress hereby reaffirms the declaration in the Price Control Extension Act of 1946 that unnecessary or unduly prolonged controls over rents would be inconsistent with the return to a peacetime economy and would tend to prevent the attainment of the goals therein declared.

"(b) The Congress therefore declares that it is its purpose to terminate at the earliest practicable date all Federal restrictions on rents on housing accommodations. At the same time the Congress recognizes that an emergency exists and that, for the prevention of inflation and for the achievement of a reasonable stability in the general level of rents during the transition period, as well as the attainment of other salutary objectives of the above-named Act, it is necessary for a limited time to impose certain restrictions upon rents charged for rental housing accommodations in defense-rental areas. Such restrictions should be administered with a view to prompt adjustments where owners of rental housing accommodations are suffering hardships because

of the inadequacies of the maximum rents applicable to their housing accommodations, and under procedures designed to minimize delay in the granting of necessary adjustments, which, so far as practicable, shall be made by local boards with a minimum of control by any central agency.

“(c) To the end that these policies may be effectively carried out with the least possible impact on the economy pending complete decontrol, the provisions of this title are enacted.”

2. That the evidence is insufficient to sustain the Trial Court's findings and judgment therein.

3. That the Trial Court erred in finding the appellant Crenshaw, as landlord, had received notice of rent orders, upon which judgment was passed, in that there was lack of definite proof that any authorized personnel of the Bozeman Rent Office or any other authorized Rent Office had mailed such notices. And there was testimony of the appellant that notices or rent orders were to be sent to his attorney. Both appellant and his attorney denied that either had received notices of rent orders from any Rent Office.

SUMMARY OF ARGUMENT

I.

Section 204 (j) of the Housing and Rent Act of 1949 is invalid and unconstitutional because:

A. It contains an illegal delegation of legislative powers by Congress:

1. To the Housing Expediter.
2. To various local boards.

3. To the governors of all states, territories and possessions of the United States.
4. To the legislatures of the various states, territories and possessions of the United States.
5. To the governing bodies of each and every incorporated city, town and village in the United States.

B. It contains an illegal delegation of legislative powers by Congress because the standards set out for exercise of legislative power by the above mentioned persons and governmental units are vague and general and depend upon the meanings ascribed by said persons and governmental units to the following phrases:

1. Sufficient construction (Section 204 (e)).
2. Otherwise reasonably met (Section 204 (e)).
3. Creation of additional rental units by conversion (Section 204 (c)).
4. Adequately provided (Section 204 (j) (i)).
5. Specifically expressed its intent (Section 204 (j) (1)).
6. No longer necessary (Section 204 (j) (2)).
7. Such a shortage of accommodations as to require rent control no longer exists (Section 204 (j) (3)).

II.

Section 209 of the Housing and Rent Act of 1949 is unconstitutional and invalid because it contains too broad a delegation of legislative power from Congress to the Housing Expediter without sufficient delineation of the limits of said power.

III.

The unconstitutionality of either or both of Section 204 (j) and 209 affects the entire Housing and Rent Act of 1949 and makes the entire statute invalid. The statute cannot exist without Section 209 and the intent of Congress to adopt the provisions of the Act only on condition that Section 204 (j) be included therein is manifest and unescapable. The clear intention of Congress overcomes any presumption of severability based upon Section 303.

IV.

The evidence is insufficient to sustain the Trial Court's finding and judgment therein.

V.

The Trial Court erred in finding that Appellant Crenshaw, as landlord, had received notice of rent orders establishing maximum rent, upon which judgment was passed, in that there was lack of definite proof that any authorized personnel of the Bozeman Rent Office or any other authorized Rent Office having mailed such notices, and there was testimony of Appellant that notice of rent orders was to be sent to his attorney and both appellant and his attorney denied that either had received rent orders from any rent office.

VI.

The Court erred in refusing to recognize contracts for extra service and extra equipment provided at tenants request over and above those required by the rental orders

ARGUMENT

I.

Section 204 (j) of the Housing and Rent Act of 1949 is unconstitutional.

A. The Standards contained in Section 204 (j) are inadequate, The Delegation of Legislative Authority is complete.

By Section 204 (j) Congress has delegated legislative authority to decontrol to the following classes or types of persons; said authority to be exercised upon conditions hereinafter noted:

1. To the respective governors of every state, territory, and possession of the United States; such authority to be exercised:

A. When the state has "adequately provided for the establishment and maintenance of maximum rents"; or

B. When the state "has specifically expressed its intent that state rent control shall be in lieu of federal rent control".

2. To the legislature of every state, territory or possession of the United States which shall by law declare that Federal rent control "is no longer necessary" in its area or any part thereof.

3. To the 'governing body' of each and every incorporated city, town or village in the United States which shall make a "finding" as a result of "a public hearing" conducted by it "that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town or village".

These delegations of power to decontrol are in addition to the authority granted by the Act to the Housing Expediter to decontrol any area or portion thereof if in his judgment the need for control no longer exists and in addition to the duty vested in the Expediter to decontrol luxury housing accommodations if in his judgment such action would result in creation of additional housing units by conversion (Section 204 (c));

Still a further delegation appears in those provisions of the Act which vest in Local Advisory Boards power to decontrol the area of their jurisdiction or any part thereof if in the judgment of the Board the need for control no longer exists due to sufficient contruction of new housing or if the demand for rental housing accommodations has been otherwise reasonable met (Section 204 (e)).

In the statute at bar, there is no right of review from the determinations of fact to be made by governors, legislatures or governing bodies of cities, towns or villages. The Housing Expediter must approve in ministerial fashion the desire for decontrol expressed by these governmental agencies.

Situations where power is delegated to a single responsible office holder appointed under Congressional supervision or to a Commission subject to judicial review are vastly different from a delegation of complete power to governors, legislatures and governing bodies of cities and villages. Admittedly, this Court has sanctioned delegation to duly constituted Commissions or Administrators. But, appellant has cited no case in any manner comparable to the case at bar in which there is complete delegation of legislative power to so many different types

of nominees to be exercised under such varying circumstances.

The exercise of the delegations of power made by this statute depend upon the meaning of the following words or phrases:

1. 'Sufficient construction (Section 204 (e)).
2. Otherwise reasonably met (Section 204 (e)).
3. Creation of additional rental units by conversion (Section 204 (c)).
4. Adequately provided (Section 204 (j) (1)).
5. Specifically expressed its intent (Section 204 (j) (1)).
6. No longer necessary (Section 204 (j) (2)).
7. Such a shortage of accommodations as to require rent control no longer exists (Section 204 (j) (3)).

And, to make the vice of this statute more apparent, the meanings of these seven phrases are to be determined not by one single Commission or authority but by:

- a. The Housing Expediter.
- b. The various local boards.
- c. The governor of any state, (territory or possession of the United States).
- d. The legislature of any state.
- e. The governing body of any incorporated city, town or village.

Delegation of power under this Act is absolute and complete and subject to no rule or reason.

Cases most applicable to this situation are Schechter

Poultry Corp. v. United States, 295 U. S. 495 and *Panama Refining Co. v. Ryan*, 293 U. S. 388. The last named case is of special significance. This Court held unconstitutional Section 9c of the National Industrial Recovery Act. The statute authorized the President of the United States to prohibit transportation in interstate and foreign commerce of petroleum in excess of the amount permitted to be produced or withdrawn from storage by any state law or by any valid regulation promulgated by a duly authorized state agency (293 U. S. 414, 415). The statute in the case at bar goes much beyond that in the case of *Panama Refining Co. v. Ryan*. There, the statute directed the President to act in accordance with State laws or regulations. Here, the discretion and power to decontrol is vested in governors, in legislatures and even in governing bodies of cities and villages. If such delegation is upheld as proper, the constitutional doctrine of separation of governmental powers is a nullity.

In the case of *Wayman v. Southard*, 10 Wheat. I Chief Justice Marshall was careful to point out that the statute there under consideration merely required federal courts, to give effect to varying methods of legal procedure in several states. The Chief Justice pointed out, however, (p. 46);

“The state assemblies do not constitute a legislative body for the union. They possess no portion of that legislative power which the Constitution vests in Congress, and cannot receive it by delegation.”

We submit that the Federal Government cannot relinquish to governors, legislatures and governing bodies of cities, towns and villages the right to declare that the area over which they have sovereignty shall be exempt

from operation of federal law. In this type of situation, where Congress has admittedly acted under its war power, the only possible method of cooperation between federal and state sovereignties is complete removal of federal regulation from the field and relinquishment of the subject matter to state control. Exercise of sovereign war power by Congress is not a proper field for "cooperation" by state or city governments as provided by this statute.

To sustain the statute it is to disregard two fundamental principles:

1. The war power of Congress is not a proper subject of delegation to the states, to governors or to governing bodies of cities or villages (Constitution Section 8, Article I).

2. The legislative powers reserved to Congress by the Constitution cannot be delegated to the several states (*Wayman v. Southard*, 10 Wheat, at page 46).

We submit that if the need for Federal regulation exists, then Congress should act accordingly, and the right of self-elimination from the needed regulation should not be vested in governors, legislatures, or the governing bodies of incorporated cities, towns and villages. Such complete and wholesale delegation of power is the key to irregularities and disorganization and not to a gradual and orderly change. Generally speaking, the use of power by Congress on the basis of existence of war or war emergency should be scrutinized with care. (Concurring opinion of Mr. Justice Jackson in *Woods v. Miller Co.*, 333 U. S. at page 147). If emergency controls are necessary and cannot be terminated without undue injury to citizens, then such controls should be maintained by the Congress. But, if the emergency is

of such nature that the controls can be lifted by so many different persons in such diverse situations, then there is no emergency and the entire field of control should be left to the several states.

II.

SECTION 209 OF THE HOUSING AND RENT ACT OF 1949 IS AN UNCONSTITUTIONAL DELEGATION OF POWER.

As originally adopted, the Emergency Price Control Act of 1942 (Section 2 (d)) granted the Housing Expediter power to promulgate regulations regarding eviction of tenants under local law. *Bowles v. Willingham*, 321 U. S. 503, did not pass upon the validity of this delegation of power and is concerned only with Section 2 (b) of the Emergency Price Control Act of 1942. But by the Housing and Rent Act of 1947, Congress reentered the field of providing for evictions. This Act prescribed a detailed series of rules governing evictions and set out various situations in which this appellant might have sought possession of his property pursuant to Montana Law.

Section 209 of the Housing and Rent Act of 1949 provides as follows:

“Section 209. Whenever in the judgment of the Housing Expediter such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any controlled housing accommodations, which in his judgment are equivalent to or are

likely to result in rent increases inconsistent with the purposes of this Act.”

Reference to Section 209 of the Act in question shows that it gives the Expediter no standard whatsoever. To begin with, he may act whenever in his judgment action may be necessary or proper to effectuate the purposes of the Act as he interprets them. Or, if he so desires, he may remain passive. The Expediter is left to exercise his own judgment and interpretation as to the purpose of the Act as intended by Congress. The Expediter is expressly given power to “regulate or prohibit” as he sees fit. This power attaches to “speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any controlled housing accommodations, which in his judgment are equivalent to or are likely to result in rent increases inconsistent with the purposes of this Act”. The Expediter may exercise his judgment as to which rent increases are inconsistent with the purposes of the Act and further as to which practices are equivalent to or even likely to result in such inconsistent rent increases. This broad language means that the Expediter is absolute czar over evictions. He has power to curtail all evictions of any kind throughout the effective date of the legislation. He has unlimited power to impose any conditions which he sees fit upon evictions and upon the rights of the appellant to resort to his remedies under the law of the State of Montana.

There are no procedural safeguards of any kind in this section of the Act to furnish protection against exercise of arbitrary power (*United States v. Rock Royal*, 307 U. S. at page 576). It is no answer to say that the regulations governing evictions as actually

adopted under Section 209 are in fact reasonable, proper and effective. The present Expediter may possibly be succeeded in office by another official whose exercise of discretion may not be held within such reasonable limits. The vice in the statute is the delegation of unlimited power and the possibility of absolute exercise thereof. It is submitted that Section 209 of the Housing and Rent Act of 1949 violates the rights of this appellant as granted by Section 1 of Article I and Paragraph 18 of Section 8 of Article I of the Constitution of the United States.

III.

SECTION 204 (j) AND 209 ARE INSEPARABLE FROM THE REMAINDER OF THE ACT AND INVALIDATION OF THE ENTIRE ACT MUST FOLLOW FROM INVALIDATION OF EITHER SECTION 204 (j) or SECTION 209.

In discussing the provisions of the Housing and Rent Act of 1949 Congress knew that the device of vesting power to decontrol in the Housing Expediter had been approved by the Supreme Court in the case of *Woods v. Miller Co.*, 333 U. S. 138. Had Congress wished rent control to remain in effect with the same provision for decontrol by the Expediter it would have been simplicity itself for Congress merely to extend the operation of the Act, including said provision for decontrol. However, Congress was not satisfied with this provision of the law and extended operation of the Act only upon the addition thereto of added machinery for decontrol as set forth in Section 204 (j). The very fact that Congress added new features and methods of decontrol in addition to those already expressed in the statute shows

that Congress wished and intended the statute to be extended only with embodiment therein of the new methods of decontrol. This accords with the expressed intention of Congress in the preamble of the Act of 1947 to terminate controls at the earliest practicable date.

In the case of *Carter v. Carter Coal Co.*, 298 U. S. 238, 312, the opinion points out that the question of separability is a matter of ascertaining the intent of Congress. The presumption in favor of divisibility does not give to the statute any force or effect different from that which would have been desired by Congress. In this case, the Housing and Rent Act of 1949 without Section 204 (j) would be vastly different from the Housing and Rent Act in its present condition. Therefore, we submit that the valid and invalid portions of the Act are indivisible and as a result the whole Act is invalid and the trial Court had no jurisdiction in this case.

IV.

THE CASE ON THE MERITS

1. The evidence is insufficient to sustain the Trial Court's findings and judgment. To be bound by the rent orders and for Plaintiff to prevail herein it is necessary to establish that Defendant had notice of such rent orders. Plaintiff's proof is lacking in this respect as is hereinafter shown.

2. There is a failure of proof to establish that notices of rent orders were given Defendant. True, when a notice is mailed, there is a presumption of delivery, but in 66 C.J.S., p. 665, we find the following text:

"A notice duly mailed will be presumed to have been delivered, but this presumption is rebuttable, as discussed in Evidence, Sec. 136."

Under the heading of Evidence in 31 C.J.S., p. 785, we find the rule applied that presumption of due receipt of a letter or other mail matter may be rebutted by evidence that it was not in fact received. (Renland vs. First Nat'l Bank, 4 P. 2d 488, 90 Mont. 424).

The testimony of appellant Crenshaw (Tr. 91) denied that he ever received any of the rent orders.

According to some authorities, addressee's positive denial of receipt of mail matter renders the presumption of little weight (Gibson vs. Rouse, 142 P. 464, 81 Wash. 102).

Or may even entirely overcome the presumption especially if uncontradicted (U. S. - Ripy vs. Cloverleaf Life & Casualty Co., C.C.A. Tex. 9 Fed. 2d 324).

And it has been held that such denial or other proof of non-receipt raises a presumption that the letter was never mailed.

Idaho - Hobson vs. Security State Bank 57 P 2d 685, 56 Ida. 601.

Mullock vs. Citizens Nat'l Bank of Salmon, 250 P. 648, 43 Ida. 214.

50 A.L.R. 1418

N. H. Wilson vs. Frankfort Marine Accident & Plate Glass, 91 A. 913, 77 N. H. 344

Okla. - Kneeling vs. Travelers 67 P. 2d 944, 180 Okla. 99

Texas - Border State Life Ins. Co. vs. Noble, Civil App. 133 S. W. 2d 119.

In 30 Am. Jur. p. 247 Sec. 28 we find the rule set forth that where notice was properly mailed its receipt will be

presumed in the absence of evidence to the contrary, and the deposit in a street letterbox or delivery to a mail carrier on duty is considered a proper mailing. This presumption may be overcome by evidence that the notice never was in fact received.

Bickerdike vs. Allen 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782

Casco Nat'l Bank vs. Shaw 79 Me. 376, 10 A. 67, 1 Am. St. Rep. 319

Huntley vs. Whittier, 105 Mass. 391, 7 Am. St. Rep. 536

Vann vs. Marbury 100 Ala. 438, 14 So. 273, 23 L. R. A. 325, 46 Am. St. Rep. 70.

By Section 93-1301-7 (24) Revised Codes of Montana 1947, under what are denominated disputable presumptions, it is provided that a letter duly directed and mailed was received in the regular course of mail. By said statute it is declared that disputable presumptions are satisfactory if uncontradicted. We submit that a presumption of this kind, if contradicted, ceases to be satisfactory evidence and evidence which is not satisfactory by Section 93-301-13, Revised Codes of Montana, 1947, is slight evidence. Satisfactory evidence is required to establish a fact.

A search of the record in this case fails to disclose mailing of notices by any particular person. However, the record does show that it was the practice of the Bozeman Office to mail such notices. Therefore, it appears that the presumption that notices were mailed is entirely overcome by the testimony of the appellant Crenshaw who denied the notice of such rent orders (Tr. 91).

Moreover, we submit that Plaintiff at the request of his tenants furnished extras in the way of furnishings and services which the District Court in equity and good conscience should have allowed to compensate appellant and offset overcharges contended for by the Plaintiff, even though this Court might feel constrained to hold that proof of notice is sufficient.

We respectfully submit that the Housing Act of 1949 is invalid and unconstitutional and that the evidence in support of Plaintiff's Complaint is insufficient to sustain the Trial Court's findings and judgment; that proof of notice is lacking to bind appellant on the rent orders which are the basis of Plaintiff's cause of action; that the testimony shows that the Defendant in his transactions as a landlord has acted in good faith and should have been allowed for extra furnishings, and if the same had been allowed, the Trial Court in equity and good conscience should not have decreed that there were overcharges; and that the Defendant is entitled to a reversal of the judgment which has been entered in the District Court.

Respectfully submitted,

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In the United States Court of Appeals
for the Ninth Circuit

No. 12602

B. M. CRENSHAW, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MONTANA

BRIEF OF APPELLEE

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FILED

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PAUL P. CANNON

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12602

B. M. CRENSHAW, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MONTANA*

BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

This is an appeal by B. M. Crenshaw, defendant below, from a final judgment, entered February 21, 1950, ordering restitution for rent overcharges, pursuant to Sections 206(a) and 206(b) of the Housing and Rent Act of 1947, as amended (50 U.S.C.A. 1881 et seq.) (R. 17).¹ Notice of appeal was filed April 21, 1950. (R. 19).

STATEMENT OF THE CASE

In its complaint, filed July 21, 1949, the United States alleged that the defendant had violated the Act of 1947 by collecting rents in excess of the legally established

¹ The text of these sections appears, *infra*, p. 8.

maxima, as specifically set forth in Schedule A (Par. IV & V, R. 3),² in the operation of a controlled housing accommodation in Bozeman, Montana. The complaint prayed for restitution³ and treble damages (R. 4).

The defendant's answer pleaded a general denial (Par. II, R. 7), and the unconstitutionality of the Act, because it "is repugnant to the due process clause of the Fifth Amendment of the Federal Constitution", (Par. III, R. 7). The case came on for trial on September 26 and 28, 1949, before the Hon. W. D. Murray (D.J.) without a jury (R. 24). At the outset the defendant moved to dismiss the complaint, on the ground that Sections 204(j)(1), (2) and (3) were unconstitutional delegations of power, and cited *United States v. Shoreline Cooperative Apts., et al.*, 84 F. Supp. 660, as authority for the motion (R. 25). The Court denied the motion (R. 35).

Prior to taking testimony the parties stipulated that "the evidence that has been given in the other case concerning identical issues that are raised in this case, * * * [will] be considered as going to the issues in

² Schedule A reads as follows:

SCHEDULE "A"

Landlord—B. M. Crenshaw			Premises—6 West Babcock Bozeman, Montana		
Unit	Tenant	Period	Chg per Mo.	Max. per Mo.	Over- charge
Apt. #7	C. A. Labbe	5-1-49/6-30-49—2 Mos.	\$65.00	\$42.50	\$45.00
Apt. #8	W. H. Westfall	5-1-49/6-30-49—2 Mos.	75.00	50.00	50.00
Apt. #9	R. G. Martin	12-1-48/6-30-49—7 Mos.	75.00	50.00	175.00
Apt. #14	L. W. Konecki	7-1-48/6-30-49—12 Mos.	75.00	50.00	300.00
Apt. #20	V. Cameron	5-2-49/6-2-49—1 Mo.	75.00	50.00	25.00
Apt. #21	Kathay Davis	6-1-48/through June 1949—13 Mos.	75.00	50.00	325.00
Apt. #30	L. S. Mann	April 1949—1 Mo.	55.00	18.00	37.00
Apt. #24	(L. Reeves (L. Ketterer	July 1-48/June 30-49—12 Mos.	75.00	65.00	120.00
Apt. #17	R. H. Henke	July 1-48/June 30-49—12 Mos.	55.00	40.00	180.00
			Total	\$1,257.00	

³ The plaintiff had a suit pending asking for an injunction against defendant for violations of said act (see *Crenshaw v. Woods*, No. 12601 (C.A. 9th)).

this case” (R. 39). An additional Apartment No. 7, was included in this case (R. 39), and the record shows the maximum rent on that apartment was established by order at \$42.50 (R. 100), dated January 4, 1947 (No. 3, R. 10).

The defendant was called as an adverse witness (R. 42), who admitted collecting more than the maximum rent ⁴ on Apartment 7 (R. 43), on Apartment 8 (R. 43), on Apartment 9 (R. 44), on Apartment 21 (R. 45), on Apartment 24 (R. 46) and Apartment 17 (R. 46). He then testified that he had settled the overcharges (R. 47), but interrogation by the Court revealed that no payment had been made, the receipts were merely evidence that the tenants were “satisfied” (R. 50).

At the conclusion of the trial the Court entered Findings of Fact and Conclusions of Law (R. 9-16). The Findings were made as to the occupant of each apartment, the duration of occupancy, the amount collected, and the maximum rent (Nos. 2-17, R. 10-13); further that, the defendant was “the landlord and operator” of the apartment (No. 1, R. 10); that the rents had not been changed since the issuance of the orders referred to in the Findings (No. 18, R. 13); and that the tenants have not sued on these overcharges (No. 19, R. 13).

As Conclusions of Law the Court held, it had jurisdiction (No. 1, R. 14), the Act is constitutional regardless of 204(j) because of the Separability clause ⁵ (No. 2, R. 14), the defendant has not exhausted his admin-

⁴ The admissions were to collecting specified sums. But the maxima had been stipulated, therefore, these amounts were obviously overcharges, where the amounts were in excess of the maxima.

⁵ *Infra*, p. 5.

istrative remedies, therefore, the orders are valid (No. 3, R. 14) ; and the amounts of overcharge on each apartment are set forth. (No. 5-11, R. 14-16).

Based on these Findings and Conclusions, the Court below entered a judgment of restitution to specified persons in the total sums of \$1262.50 (R. 17). From that judgment defendant appeals (R. 19).

ARGUMENT

I

The Housing and Rent Act of 1947 as Amended Is Constitutional

Little time need be spent in this brief in arguing the constitutionality of sections 204 (j) (1), (2), and (3). Although the appellant places the gravamen of his appeal on the constitutionality of that section (Br. 6), the question has already been determined by the Supreme Court. The late Judge Shaw, sitting in the Northern District of Illinois, ruled that the Housing and Rent Act of 1947, as amended, was unconstitutional because of an unlawful delegation of authority in the said section and because it was not severable from the remainder of the Act, *United States v. Shoreline Cooperative Apartments, Inc., et al.*, 84 F. Supp. 660. The Supreme Court reversed that decision and held section 204 (j) constitutional on the authority of *Woods v. Miller Co.*, 333 U. S. 138. *United States v. Shoreline Cooperative Apartments, Inc., et al.*, 338 U. S. 897, 70 S. Ct. 248, rehearing denied January 9, 1950.⁶

While the *Shoreline* case was pending, the respondents therein expanded their brief to cover all phases of

⁶ This case was No. 334, October term of 1949 United States Supreme Court. Copies of the Petitioner's Brief and Reply Brief setting forth these points in full, will be made available to this Court at the time of oral argument.

constitutionality including an attack upon section 209 of the Act and also an attack upon the validity of said Act because of a want of due process.⁷ The Supreme Court had briefed for it and orally argued before it the following constitutional questions: The validity of section 204 (j) (1), (2), and (3) and section 209;⁸ separability;⁹ the War Power; delegation to the Housing Expediter; due process; reasonable rate of compensation; alleged absence of judicial review; use of confidential information; and alleged arbitrary classification.

In deciding that the Act of 1947 (61 Stat. 93) was constitutional, the Supreme Court in *Woods v. Miller Co.*, 333 U. S. 138, held that under the present Act "the powers thus delegated are far less extensive than those sustained in *Bowles v. Willingham*, 321 U. S. 503 at pages 512-515" (333 U. S. at page 144).¹⁰ ~~The general question of constitutionality and specifically section~~ question of constitutionality and specifically sections 204 (j) and 209 were passed upon by the Supreme Court as stated above in *United States v. Shoreline Cooperative Apartments, Inc.*, *supra*. Furthermore, the Court of Appeals for the Third Circuit in *Woods v. Durr*, 176 F. 2d 273, held that section 209 was valid on the authority of *Bowles v. Willingham*, *supra*, and *Woods v. Miller Co.*, *supra*.

⁷ The question of the validity of section 209 was not presented in the Court below and therefore, is not properly before this Court.

⁸ The text of Section 209 appears *infra*, p. 10.

⁹ Section 303 of the Act provides as follows:

Sec. 303. If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the Act, and the applicability of such provision to other persons or circumstances, shall not be affected thereby.

¹⁰ Section 2(d) of Act of 1942, is set forth in full, *infra*, p. 10.

It is respectfully submitted that since these questions have been specifically passed upon by the Supreme Court no constructive purpose would be served by a prolonged argument in this Court respecting them.

II

Consideration of Appellant's Arguments

In his list of arguments on page 8 of his brief appellant argues the insufficiency of the evidence (Par. IV); the invalidity of the orders on the basis of failure to give notice (Par. V); and, the failure of the court to give credit for extra services (Par. VI). It would be unduly burdensome to reargue these questions. All three arguments have been made in the appellee's brief in *Crenshaw v. Woods*, No. 12601, heretofore filed in this Court. The question of insufficiency of the evidence is argued, pages 12-16; failure to give notice is argued, pages 7-11; and, failure to give credit for extra services is argued, pages 18-23; and that the Court below found appellant had not exhausted his administrative remedy. It therefore, follows that this Court does not have jurisdiction to consider the validity of the orders as is discussed in the brief at pages 6-11. The appellee herewith adopts those arguments as presented in this Honorable Court.

CONCLUSION

It is respectfully submitted that the questions raised by appellant are clearly without merit and the judgment of the Court below should be affirmed.

ED DUPREE,

General Counsel;

LEON J. LIBEU,

Assistant General Counsel;

FRANCIS X. RILEY,

Special Litigation Attorney,

Office of the Housing Expediter,

Washington 25, D. C.

APPENDIX

APPLICABLE PROVISIONS OF THE HOUSING AND RENT ACT
OF 1947, AS AMENDED, 50 USCA 1881 et seq.

SEC. 206. (a) It shall be unlawful for any person to offer, solicit, demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204 or otherwise to do or omit to do any act in violation of any provision of this title.

(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Section 204 (j)

(1) Whenever the governor of any State advises the Housing Expediter that the legislature of such State has adequately provided for the establishment and maintenance of maximum rents, or has specifically expressed its intent that State rent control shall be in lieu of Federal rent control, with respect to housing accommodations within defense-rental areas in such State and of the date on which such State rent control will become effective, the Housing Expediter shall immediately make public announcement to the effect that he has been so advised. At the same time all rent controls under

this Act, as amended, with respect to housing accommodations within such State shall be terminated as of the date on which State rent control is to become effective. As used in this subsection, the term "State" means any State, Territory, or possession of the United States.

(2) If any State by law declares that Federal rent control is no longer necessary in such State or any part thereof and notifies the Housing Expediter of that fact, the Housing Expediter shall immediately make public announcement to the effect that he has been so advised. At the same time all rent controls under this act, as amended, with respect to housing accommodations within such State or part thereof shall be terminated on the fifteenth day after receipt of such advice. As used in this subsection, the term "State" means any State, Territory, or possession of the United States.

(3) The Housing Expediter shall terminate the provisions of this title in any incorporated city, town or village upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable local law and based upon a finding by such governing body reached as the result of a public hearing held after 10 days' notice, that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town or village: *Provided, however,* That such resolution is first approved by the Governor of the State before being transmitted to the Housing Expediter: *And provided further,* That where a major portion of a defense-rental area has been decontrolled pursuant to this paragraph (3), the Housing Expediter shall decontrol any unincorporated locality in the remainder of such area.

Section 209 of the 1949 Act:

“Whenever in the judgment of the Housing Expediter such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any controlled housing accommodations, which in his judgment are equivalent to or are likely to result in rent increases inconsistent with the purposes of this Act.”

Emergency Price Control Act of 1942, as amended,
50 USCA 901 et seq., Section 2(d):

“Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which, in his judgment are equivalent to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act.”

No. 12606

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SIDNEY GANDELMAN,

Appellant,

vs.

THE MERCANTILE INSURANCE COMPANY OF AMERICA
and THE RELIANCE INSURANCE COMPANY OF PHILA-
DELPHIA,

Appellees.

APPELLEES' BRIEF.

FILED

OCT 17 1950

PAUL P. O'BRIEN,
CLERK

HINDMAN & DAVIS,

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Attorneys for Appellees.

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and THE RELIANCE INSURANCE COMPANY OF PHILA-
DELPHIA,

Appellees.

APPELLEES' BRIEF.

Statement of the Case.

This is a suit by appellant against the two appellees to recover upon two separate policies of fire insurance alleged to have been in effect at the time of a fire occurring April 11, 1947.

Appellees' answer put in issue certain of the allegations of the complaint, and after a partial trial resulting in a mistrial, a partial stipulation of facts was entered into. [Tr. Vol. I, pp. 20-26.]

Appellant made a motion for summary judgment against both appellees upon the ground that there was no genuine issue as to any material facts and based his motion upon the pleadings, stipulation of facts and his affidavit filed

therewith. [Tr. p. 28.] Appellees, and each of them, made a motion for summary judgment in their favor on the ground that there was no genuine issue as to any material facts and based their motion upon the affidavit of Edward Oelsner, the pleadings and files and proceedings herein, the stipulation of facts, and the transcript of the proceedings of March 8, 1949 (the partial trial resulting in mistrial), and upon certain exhibits referred to in the aforesaid stipulation of facts.

The court denied appellant's motion and granted appellees' motion. [Opinion, Tr. Vol. I, pp. 82-94; Judgment, Tr. Vol. I, pp. 95-96.]

Statement of Facts.

The motions for summary judgment made by both appellant and appellees were based upon the grounds that there was no genuine issue as to any material fact and each party moved for judgment as a matter of law.

The trial court made a careful analysis of the undisputed facts in its opinion, accepting, where there was any inference or apparent conflict, appellant's version and resolving it against appellees, and to his statement of facts we first refer. [Opinion, Tr. Vol. I, pp. 83-86.] A signed statement of facts was filed in the action, which statement of facts followed the complaint and covered all of the material facts alleged therein, with the exception of three paragraphs which will hereinafter be noted. [Stipulation of Facts, Tr. Vol. I, pp. 20-26.]

It is as follows:

“IT IS HEREBY STIPULATED AND AGREED between plaintiff and defendants that the following facts are stipulated to be true for all purposes of the trial herein:

I.

That this Court has jurisdiction of this action by reason of the following facts, the particulars of which are hereinafter more fully alleged: a diversity of citizenship exists between the plaintiff and each of the defendants and the amount in controversy is in excess of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs.

II.

At all times herein mentioned, plaintiff was, and now is a citizen and resident of the State of California.

III.

Defendant, The Mercantile Insurance Company of America, is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of New York, a citizen and resident of said State of New York, and authorized to transact the business of fire insurance in and by the State of California.

IV.

Defendant, The Reliance Insurance Company of Philadelphia, is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, a citizen and resident of said State of Pennsylvania, and authorized to transact the business of fire insurance in and by the State of California.

V.

At all times herein mentioned, plaintiff was engaged in business at number 145 South Anderson Street, Los Angeles, California, under the fictitious name of New York Furniture Company, and was the owner of certain merchandise consisting principally of furniture, located at said address; prior to the filing of this complaint, plaintiff had filed with the County of Los Angeles, a certificate of doing business under the name of New York Furniture Company.

VI.

At all times herein mentioned, the National Fire Insurance Company of Hartford was a corporation transacting the business of fire insurance in the State of California.

VII.

At all times herein mentioned, Edward Oelsner of Los Angeles, California, was duly licensed by the State of California to act as agent for fire insurance companies, and at all of said times said Edward Oelsner was the duly appointed, authorized, and acting agent for defendants, The Mercantile Insurance Company of America, The Reliance Insurance Company of Philadelphia, and for said National Fire Insurance Company of Hartford.

VIII.

On or about October 1, 1946, said National Fire Insurance Company of Hartford, by and through its said agent, Edward Oelsner, issued to plaintiff its provisional reporting form policy of fire insurance No. 281653, insuring plaintiff for one year against loss to said stock of merchandise for the provisional amount of \$100,000.00, being 100% of the total con-

tributing insurance with a limit of liability for all contributing insurance of \$175,000.00. That said policy except as to insuring company, provisional amount, percentage of contribution, and limit of liability was identical in form with Exhibits 'A' and 'B' attached to plaintiff's complaint.

IX.

On or about April 2, 1947, said National Fire Insurance Company of Hartford executed and delivered to its said agent, Edward Oelsner, for attachment to said policy, an endorsement wherein it was provided that said policy should be for the provisional amount of \$50,000.00, being 50% of the total contributing insurance, with a limit of liability for all contributing insurance of \$140,000.00; upon receipt of said endorsement and on or about April 3, 1947, said Edward Oelsner requested said National Fire Insurance Company of Hartford to amend said endorsement to provide that said policy should be for the provisional amount of \$50,000.00, being 35% of the total contributing insurance, with a limit of liability for all contributing insurance in the sum of \$200,000.00 and said National Fire Insurance Company of Hartford did thereupon execute and deliver to said Edward Oelsner an amended endorsement in conformity to and in compliance with said request.

X.

On or about April 2, 1947, said Edward Oelsner, as agent for defendant, The Mercantile Insurance Company of America, did thereupon contact the Los Angeles office of said defendant and did request of said defendant permission to issue to plaintiff a provisional reporting form policy of fire insurance covering said merchandise; that said defendant did then

and there authorize its said agent, Edward Oelsner, to execute and issue its policy of fire insurance No. 290973 in favor of plaintiff and insuring said merchandise for the provisional amount of \$5,000.00, being 5% of the total contributing insurance, with a limit of liability for all contributing insurance in the sum of \$200,000.00; that said Edward Oelsner, as such agent, did thereupon prepare said policy; that a photostat copy of said policy is attached to plaintiff's complaint and marked Exhibit 'A,' and is hereby referred to the same as though herein set forth in full.

XI.

On or about April 2, 1947, said Edward Oelsner, as agent for the Defendant, The Reliance Insurance Company of Philadelphia, did thereupon contact the Los Angeles Office of said defendant, and did request said defendant to issue to plaintiff a provisional reporting form policy of fire insurance covering said merchandise; that said defendant did then and there authorize its said agent, Edward Oelsner, to execute and issue its policy of fire insurance No. PF 804647 in favor of plaintiff and insuring said merchandise for the provisional amount of \$12,500.00, being 7½% of the total contributing insurance, with a limit of liability for all contributing insurance in the sum of \$200,000.00; that said Edward Oelsner, as such agent, did thereupon prepare said policy; that a photostat copy of said policy is attached to plaintiff's complaint and marked Exhibit 'B' and is hereby referred to the same as though herein set forth in full.

XII.

On April 11, 1947, from a cause unknown, a fire occurred on the premises referred to in paragraph V

and completely burned and destroyed plaintiff's said stock of merchandise; said stock of merchandise immediately before its destruction by said fire, was of a reasonable value of not less than \$143,978.96.

XIII.

That shortly after said fire, defendants designated Fire Companies Adjustment Bureau, Inc. to investigate and report to them the amount of loss and damage occasioned by said fire and the National Fire Insurance Company designated said Fire Companies Adjustment Bureau, Inc. to act as adjuster for it in connection with the adjustment of plaintiff's said fire loss.

XIV.

As to the allegations of Paragraph XVII of plaintiff's complaint, it is stipulated that plaintiff or anyone acting for or in his behalf had no notice or knowledge of any of the facts or circumstances stipulated to in Paragraphs IX, X and XI hereof until on or about the 17th day of May, 1947, after the fire, when on said date the said Edward Oelsner delivered to plaintiff the exhibits 'A' and 'B' herein referred to and informed plaintiff of the facts set forth in Paragraphs IX, X and XI of this Stipulation.

XV.

On June 9, 1947, plaintiff and defendants, and National Fire Insurance Company of Hartford, acting by said Fire Companies Adjustment Bureau, Inc. entered into a written agreement fixing the sound value of plaintiff's said merchandise at the time of said fire in the sum of \$143,978.96, and the amount of loss and damage to said merchandise by reason of said fire in the sum of \$143,978.96. Said agreement

is hereto attached marked Exhibit 'C' and made a part hereof.

XVI.

Defendants and each of them waived the requirement in said policies that proofs of loss be filed within sixty days from the date of the fire; that on July 20, 1947, plaintiff filed with each defendant, sworn proof of loss wherein and whereby he claimed the sum of \$7,198.95 from defendant, The Mercantile Insurance Company of America, and the sum of \$10,798.43 from defendant, The Reliance Insurance Company of Philadelphia, being the pro rata amounts (to wit: 5% and 7½%, respectively, of said loss of \$143,978.96).

XVII.

It is stipulated that if judgment is entered in favor of plaintiff that it may be against defendant, The Reliance Insurance Company of Philadelphia in the amount of \$10,798.43 and against defendant Mercantile Insurance Company of America, in the amount of \$7,198.95."

In addition to the foregoing stipulation of facts, the appellant, for support of his motion, relied upon his own affidavit and the pleadings herein [Tr. Vol. I, p. 28], and appellees, in support of their motion, relied upon the foregoing stipulation of facts, the testimony adduced by plaintiff in the trial, and the affidavit of Edward Oelsner above referred to [Tr. Vol. I, p. 48].

The stipulation of facts covered all of the material facts except the facts relating to the conversations between the appellant and appellees' agent, Edward Oelsner, prior to the loss, and the facts relating to the payment of the

premium. However, although there is some variance in the testimony of appellant and appellees' witness on these points, appellees contended and contend that there was no material difference in law between the evidence and invited the trial court, for the purpose of the motion, to accept appellant's version, which the trial court did. [Opinion, Tr. Vol. I, p. 83, lines 5-8; p. 85, lines 23-26; p. 86, lines 6-9.]

In paragraph X of appellant's complaint, appellant alleged that in March, 1947, he requested said Edward Oelsner to increase the limit of liability of the fire insurance on said merchandise to the sum of \$200,000.00, in such company or companies as should be selected by the said Edward Oelsner. [Tr. Vol. I, p. 5, lines 5-9.] In his affidavit in support of his motion, he says:

"In the latter part of March, 1947, affiant requested of said Oelsner that he increase the amount or limit of liability of affiant's fire insurance company from \$175,000.00 to \$200,000.00 and the said Oelsner thereupon stated to affiant, 'you are covered.'" [Tr. Vol. I, pp. 10 to 13.]

In his direct testimony at the trial, appellant testified as follows:

"I told him I would want more insurance and he said, 'how much do you think you need?,' and I said 'another \$25,000 at the present time would cover it.' That was the conversation that I had." [Tr. Vol. II, p. 73, lines 22-25.]

Again on cross-examination at the trial he said:

“Q. Now, just what were the exact words you used to Mr. Oelsner in March when you told him you had been getting in some new stuff? A. What he told me?

Q. No, what you told him—what were the exact words you used? A. Well, I told him, I says, ‘Mr. Oelsner,’ I says, ‘I am getting in some more goods. There is another carload or two carloads of bedroom suits and dining room suites coming in.’ I even told him the company, the name of the company, and I said, ‘I need some more insurance.’ He said, ‘How much more do you think you need?’ and I said, ‘I think \$25,000 will cover it.’ He said, ‘Okay, Sidney, you are covered.’

Q. And did he say how you were covered? A. Didn’t say nothing.

Q. Where were you covered? A. He did not explain me anything.

Q. Or what you were covered in—what company you were covered in? A. All he said to me was, ‘Sidney, you are covered.’ The same thing always took place whenever I called him.

.

Q. By Mr. Davis: Did he say from when you were covered? A. Did he say from when?

Q. Yes. A. I don’t understand the question.

Q. From what date you were covered? A. He did not. He told me, ‘You are covered.’

Q. Is that all he said? A. That is right. He said, ‘You are covered—I will take care of you.’”
[Tr. Vol. II, p. 94, lines 22-25; p. 95, lines 1-19; p. 96, lines 3-12.]

The foregoing is all of the evidence of appellant on this point.

Appellees have an entirely different version, and although the court, for the purpose of the motion, adopted appellant's version, we believe the court should also, in considering one of the motions, have a brief résumé of appellees' version on this point.

As shown by the affidavit of Edward Oelsner, appellees' agent, which statements were not denied, and the stipulation of facts, appellant had in full force and effect at all times a policy with the National Fire Insurance Company which had been executed and delivered about October 1, 1946. This policy was in the same form as the policies of the two appellees, that is, a provisional reporting form, and provided that it insured up to a limit of \$175,000.00, being 100% of all contributing insurance. This policy, as well as the policies of appellants, provided for a premium to be paid upon the basis of values reported, and provided that the insurance would cover in accordance with the reports of values filed and at the time of the loss should not cover for more than the amounts included in the last report of values filed prior to the loss. Mr. Oelsner deposes that appellant had not filed monthly reports in accordance with the terms of this policy, the last written report of value had been filed on December 12, 1946, for the period ending November 30, 1946, and showing a value of \$101,766.95. That he, on several occasions, had called appellant to remind him of the delinquency and to request that he provide the necessary reports of value as provided for in the National policy. [Tr. Vol. I, p. 51, lines 5-14.] That in the latter part of March, 1947, he had a telephone conversation with Mr. Gandelman concerning the insurance coverage. At that time appellant

stated that he had \$165,000.00 in stock at his location, and Oelsner advised him that the National policy had a maximum of \$175,000.00, and that he was covered up to \$175,000.00, provided he furnished his report for the National Fire Insurance Company to that amount. [Tr. Vol. I, p. 52, lines 8-15.] That he had no other or further conversation with Mr. Gandelman regarding his insurance until after the fire. [Tr. Vol. I, p. 52, lines 14-17.] And that at no time did Gandelman ever ask for or suggest any insurance other than the insurance in the National Fire Insurance Company under the policy referred to, and at no time did he, Oelsner, acting for the appellees or any other of the companies which he represented as agent, suggest to Gandelman that he should have any other or different insurance, as he felt that Gandelman was amply protected against loss by fire by the National Fire Insurance policy referred to, provided he made the reports required, and so advised him. [Tr. Vol. I, p. 52, line 1, to p. 53, line 5.]

As to the payment of the premium, appellant deposed that he paid the premium, and that Oelsner tendered the premium back but the tender was refused by him. [Tr. Vol. I, p. 34, line 19, to p. 35, line 17.]

Oelsner deposes that in the course of business that he, when he delivered the policies to Gandelman with an invoice; that he and Gandelman had a running account and that Gandelman had never balanced the account and that at all times from May 17, 1947, until after the commencement of the action, the balance due from Gandelman to him was in excess of the total of the premiums for the two policies in question. [Tr. Vol. I, p. 58, lines 13-19.] That prior to the commencement of this action, at the direction of the defendant companies, he, Oelsner, ten-

dered to appellant the full amount of the deposit premiums and that appellant refused the tender and that Oelsner thereupon credited the appellant's account for the full amount of the premiums and notified the appellant thereof. [Tr. Vol. I, p. 59, lines 3-10.]

To summarize the entire evidence, adopting appellant's version wherever there is any inference or testimony at variance with appellees, we have the following situation: At all times herein material, appellant was insured by the National Fire Insurance Company under a policy which provided for \$175,000.00 limit of liability with the National Fire Insurance Company specifying that it was carrying 100% of all contributing insurance. This policy required only that appellant report to the National Fire Insurance Company the amount of values at risk and the insurance desired up to \$175,000.00. In the latter part of March, 1947, appellant called Oelsner, agent for the National Fire Insurance Company as well as agent for the appellees, and stated to him that there was another carload or two of bedroom suites coming in and he needed some more insurance, and Oelsner asked him, "how much more do you think you need?" and he told Oelsner, "I think \$25,000 will cover it," and Oelsner said, "Okay, Sidney, you are covered." No further communication was had between the appellant and Oelsner regarding the matter until after the fire.

In the early part of April, 1947, the National Fire Insurance Company advised Oelsner that they had too much at risk and requested Oelsner to reduce their limit of liability from 100% of \$175,000.00 to 35% of \$200,000.00. Oelsner advised the National Fire Insurance Company that they would attempt to procure other insurance to take up the difference, but that he would expect them to keep

their insurance in full force and effect until he could get commitments from other companies.

On about April 3, 1947, he was advised by appellee, Mercantile, that they would authorize a limit of 5% of \$200,000.00 and by the Reliance Insurance Company that they would authorize a 7½% of a \$200,000.00 limit. Oelsner, prior to the fire, was unable to get further commitments from other companies and, being unable to get in touch with appellant to advise him of the desires of the National to reduce their coverage, advised the National that no steps were to be taken toward cancelling or reducing their policy until he had conferred with Gandelman.

The fire occurred on April 11, 1947, and at that time the National policy was in full force and effect according to its terms.

After the fire, Oelsner, taking the position that the National policy was covering in full according to its terms, did nothing about the policies which he had prepared in appellee companies until about May 17, 1947, when, fearing a controversy with the National, he delivered the policies to Gandelman and related the full circumstances of what had taken place.

He at all times was acting as agent for the National and appellees, and was not agent for the appellant in any respect. Appellant knew nothing of the transaction between Oelsner and his principal, the appellees and the National Fire Insurance Company, until May 17, 1947, when Oelsner delivered the policies together with an invoice and statement of the transaction as here related. Gandelman made claim against the National and recovered the full amount of his coverage as limited by his declarations.

Argument.

The appellant makes two assignments of error:

1. That the court erred in granting defendants' motion for the reason that there were material issues of facts to be tried.

2. That the court erred in denying plaintiff's motion as there were no material issues of fact to be determined.

Taking appellant's second assignment first, and to dispose of it, we can state that we have no quarrel with the authorities cited by appellant under the heading of "The Rule Applicable on Motion for Summary Judgment" and believe the case cited on page 18 of appellant's brief, *Associated Press v. U. S.*, 326 U. S. 1, where the court says that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, and no genuine issue remains for trial. And in this respect we believe that it can be demonstrated with very few words that the court did not err in denying plaintiff's motion. According to appellees' evidence in the form of the Oelsner affidavit appellant at no time requested any other insurance than the National Fire Insurance and that the conversations between Oelsner and appellant related to the National, and no other insurance. That Oelsner prepared appellees' policies not for the purpose of effecting insurance, but as part of his efforts to procure an additional \$130,000.00 of insurance if and when the National policy was reduced to \$70,000.00 and that he saw to it that the National policy remained in full force and effect and that he had no intention of putting appellees' policies into effect until the other commitments

had been obtained, when he would have notified Gandelman of the desire of the National. And further that he did not deliver appellees' policies to appellant over a month after the fire for the purpose of putting the insurance into effect, but for the purpose of aiding the appellant in his negotiations with the National.

The foregoing statment in itself is sufficient to demonstrate that the court could not have granted appellant's motion unless appellant had been willing to accept the version of facts as set out by appellees, and demonstrates from that standpoint a material issue of facts on all of the issues above mentioned.

The Court Did Not Err in Ordering and Entering a Summary Judgment in Favor of Appellees.

Rule 56 of Rules of Civil Procedure contemplates and provides that when a moving party is entitled to a judgment as a matter of law, judgment shall be entered accordingly. In this case, on appellees' motion there are no facts to warrant any other judgment than that ordered by the court, to wit, one in favor of appellees.

Such variance as exists between the testimony of appellant and the testimony of appellees' witness does not affect the proposition that on appellant's testimony and record alone, and disregarding appellees' testimony, appellees were entitled to the judgment the court gave as a matter of law.

It is obvious, as will be hereinafter demonstrated by the cases, that if there was not in existence between appellant and appellees at the time of the fire a contract or contracts of insurance, that appellant was not entitled to recover and judgment as a matter of law was properly

ordered for appellees. This is clearly demonstrated when we consider the whole case under the following headings:

1. WAS THERE IN EXISTENCE AT THE TIME OF THE FIRE OF APRIL 11, 1947, WHICH DESTROYED THE PROPERTY INVOLVED, A VALID ENFORCIBLE CONTRACT OR CONTRACTS OF FIRE INSURANCE BETWEEN PLAINTIFF AND DEFENDANTS.

2. DID THE DELIVERY BY DEFENDANTS' AGENT OELSNER TO PLAINTIFF OF THE TWO POLICIES OF INSURANCE AFTER THE FIRE CREATE A CONTRACT RETROACTIVE TO THE DATE OF THE FIRE.

3. DID THE COLLECTION OF THE PREMIUM BY OELSNER LONG AFTER THE FIRE, AS ALLEGED BY PLAINTIFF, AND THE FAILURE TO RETURN THE SAME UNTIL A FEW MONTHS BEFORE THE COMMENCEMENT OF THE SUIT, CREATE A CONTRACT BY ESTOPPEL.

Examining the first of the above propositions in light of plaintiff's testimony we find that plaintiff's claim relating thereto rests upon a single conversation. He testified in regard thereto as follows:

"Q. No, what you told him—what were the exact words you used? A. Well, I told him, I says, 'Mr. Oelsner,' I says, 'I am getting in some more goods. There is another carload or two carloads of bedroom suits and dining room suites coming in.' I even told him the company, the name of the company, and I said, 'I need some more insurance.' He said, 'How much more do you think you need?' and I said, 'I think \$25,000 will cover it.' He said, 'Okay, Sidney, you are covered.'

Q. And did he say how you were covered? A. Didn't say nothing.

Q. Where were you covered? A. He did not explain me anything.

Q. Or what you were covered in—what company you were covered in? A. All he said to me was, 'Sidney, you are covered.' The same thing always took place whenever I called him."

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"Q. By Mr. Davis: Did he say from when you were covered? A. Did he say from when?

Q. Yes. A. I don't understand the question.

Q. From what date you were covered? A. He did not. He told me, 'You are covered.'

Q. Is that all he said? A. That is right. He said, 'You are covered—I will take care of you.'" [Tr. Vol. II, p. 95, lines 1-19; p. 96, lines 3-12; p. 73, line 22, to p. 74, line 8.]

It is undisputed that the National Fire policy was in full force and effect in the latter part of March, 1947, with a limit of liability of \$175,000.00. It is also undisputed that appellant had failed to file reports of value as provided for in said policy, his last written report of values having been filed for the period ending November 30, 1946, disclosing a value of \$101,766.95. Appellant deposes [Tr. Vol. I, p. 30, lines 4-7] that after the execution of the National policy, he, from time to time, orally advised Oelsner's office of the approximate value of his stock on hand. This is confirmed by Oelsner in his affidavit in which he says [Tr. Vol. I, p. 51, lines 21-26; p. 52, lines 7-14], appellant notified him by telephone that his values had increased to \$162,000.00 and in the latter part of March, 1947, appellant advised him that he had values of \$165,000.00 and Oelsner advised him that his policy had

a maximum of \$175,000.00 and he was covered up to that amount, provided he furnished his reports to the National Fire Insurance Company to that amount. [Tr. Vol. I, p. 52, lines 10-14.] It is obvious that any conversation that appellant had with Oelsner in reference to his values and coverage was with relation to the National Fire policy and this appellant himself confirms in his affidavit in support of his motion. Speaking of meetings with the adjusters that occurred after the fire, he states:

“That at said meetings the question of affiant’s failure to file written reports of value with National was discussed, and affiant and Oelsner asserted that the policy provisions relating to written reports of value was waived by National because Oelsner had verbally informed National of such values shortly before the fire.” [Tr. Vol. I, p. 32, line 22, to p. 33, line 2.]

Disregarding, however, the clear inference from these admitted facts and appellant’s own admissions that the conversation with Oelsner in the latter part of March related to reports under the National policy only, and taking the statements of appellant in his affidavit and the transcript at its face value, it is clear, nevertheless, that no contract of insurance for any amount was entered into between appellant and these appellees in the latter part of March, or at any other time.

It is not claimed that there was other than the one conversation in the latter part of March, 1947, and, considering this, what do we have? When asked to give the exact words used, he stated: “ ‘Well,’ I told him, I says, ‘Mr. Oelsner,’ I says, ‘I am getting in some more goods. There is another carload or carloads of bedroom suites and dining

room suites coming in.' I even told him the name of the company and I said, 'I need some more insurance.' He said, 'How much do you think you need?' and I said, 'I think \$25,000.00 will cover it.' He said, 'Okay, Sidney, you are covered.' "

This is all that it is claimed was ever said prior to the fire, or for some time thereafter.

Does this make a contract between appellant and appellees by which the parties were mutually bound, appellant to pay a premium to appellees and appellees to make good a loss by fire?

Preliminarily it can be said without reserve that insurance is a contract between parties and governed by the same rules which are applicable to contracts generally.

Insurance Code, Sec. 22;

Mauck v. Northwestern Nat'l Ins. Co., 102 Cal. App. 510, 283 Pac. 338;

Wells Fargo & Co. v. Pacific Insurance Co., 44 Cal. 397;

Boyer v. U. S. Fidelity & Guaranty Co., 206 Cal. 273, 274 Pac. 57;

Bassi v. Springfield Fire Ins. Co., 57 Cal. App. 707, 208 Pac. 154;

Boole v. Union Marine Ins. Co., 52 Cal. App. 207, 198 Pac. 416.

"A contract of insurance must be governed and interpreted by the same rules which ordinarily apply to other contracts, and it will be enforced only according to the manifest intention of the parties."

Stevenson v. Sun Insurance Office, 17 Cal. App. 280, 119 Pac. 529.

“Insurance policies are governed by the same general rules which pertain to all contracts. There must be a meeting of the minds.”

Boyer v. U. S. Fidelity & Guaranty Co., supra.

Tested by the ordinary rules of contract, there must be an offer and an acceptance communicated between the parties and the minds of the parties must have met and agreed upon all the essential elements of the contract whereby they became mutually bound. The essential elements of an insurance contract are:

- (1) The parties between whom the contract is made.
- (2) The property or life insured.
- (3) The interest of the insured in property insured, if he is not the absolute owner thereof.
- (4) The risks insured against.
- (5) The period during which the insurance is to continue.
- (6) Either:
 - (a) A statement of the premium, or
 - (b) If the insurance is of a character where the exact premium is only determinable upon the termination of the contract, a statement of the basis and rates upon which the final premium is to be determined and paid.

Insurance Code, Sec. 380;

K. C. Working Chemical Co. v. Eureka-Security Fire & Marine Ins. Co., 82 Cal. App. 2d 120, 185 P. 2d 832.

In *American Can Co. v. Agricultural Ins. Co.*, 12 Cal. App. 133, 106 Pac. 720, the court said:

“A parol contract of insurance may be made and is enforceable; but as such contracts are rarely made, and are not made in the usual and ordinary course of business, the proof of such oral contract must be clear and convincing. In fact, it is the universal custom of insurance companies to issue written policies, with full and minute specifications as to their liability and the exceptions that would make the policy void. The preliminaries, as in contracts for the sale of real estate, are usually only negotiations which are afterward merged into the written contract. Hence it is at once apparent, even to the layman, that in the somewhat unusual claim that an oral contract of insurance was entered into, the only safe and sound rule is to require the proof to be clear and convincing to the effect that the contract was actually entered into, that each party understood it in the same light, and in regard to the same subject matter. (*Kerr on Insurance*, 52, sec. 33; 13 *Am. & Eng. Ency. of Law*, p. 221; *Cleveland Oil & Paint Mfg. Co. vs. Norwich Union Fire Ins. Co.*, 34 Or. 228, (55 Pac. 435).)”

In *K. C. Working Chemical Co. v. Eureka-Security Fire & Marine Ins. Co.*, *supra*, the court, by Vallée Judge, has epitomized the rules relating to oral contracts as follows:

“To constitute a verbal contract of insurance the minds of the parties must have met upon all of the essential elements of the contract. The testimony must make clear the subject-matter of insurance, the amount and elements of the risk, including its dura-

tion in point of time and extent in point of hazard assumed, the rate of premium, and generally all the circumstances which are peculiar to the contract and distinguish it from every other so that nothing remains to be done but to fill up the policy and deliver it, on the one hand, and pay the premium on the other. (Citing cases.)”

“Oral contracts of insurance must be definite and certain. The parties must agree on all of the essential terms. (Citing cases.)”

“To constitute a valid contract of insurance the minds of the parties must have met on the identity of the person with whom they are dealing. (Citing cases.)”

“A contract of insurance is not effected by a transaction which does not supply the element of mutuality of agreement and mutuality of obligation. (Citing cases.)”

“Until an application for insurance is accepted, no contractual relation exists between an applicant for insurance and an insurance company. (Citing cases.)”

“An insurance company is not bound to accept an application or proposal for insurance but may reject it for any reason or arbitrarily. (Citing cases.)”

“A mere intention or mental determination on the part of the insurer to accept the application is not of itself sufficient to effect a binding contract. (Citing cases.)”

“A contract of insurance must be assented to by both parties either in person or by their agents. (Citing cases.)”

“There can be no enforceable contract of insurance if the insured and an agent who represents several companies fail to designate one of the companies before a loss occurs. (Citing cases.)”

“It is held in a number of cases that payment of the premium is a condition which must be fulfilled if temporary insurance is to be considered as affording protection to the applicant. (Citing cases.)”

“Mere delay in acting on an application does not create a contract of insurance. (Citing cases.)”

In *American Can Co. v. Agricultural Ins. Co.*, 12 Cal. App. 133, 106 Pac. 720, followed and cited with approval by the court in the case of the *K. C. Working Chemical Co.*, *supra*, plaintiff's broker prepared slips for the renewal of a policy which was to expire the following day and took the slips to the office of Edward Brown & Sons, the agents for the Agricultural Insurance Company, and said to Mr. Brown, “Here, Fred, are some renewals for you” and Mr. Brown said, “All right,” and put these slips in a drawer of his desk. The court held that the evidence was insufficient to prove an oral contract and reversed a judgment for the plaintiff. The court in that case, in addition to the language heretofore quoted from it, has the following to say:

“A contract is an agreement to do or not to do a particular thing. It must be by consent, which is free, mutual and communicated by each to the other. The consent is not mutual unless the parties all agree upon the same thing in the same sense, and unless they do so agree there is no contract. How can it be said

that the defendant agreed to issue a policy to plaintiff when the name of plaintiff was not even mentioned nor in any way communicated to defendant in the oral conversation?"

In *Law v. Northern Assurance Co.*, 165 Cal. 394, 132 Pac. 590, cited with approval in the *K. C. Working Chemical Co.* case, the facts were that the broker for the plaintiff assured met the agent of the insurance company and stated to him, "Henry, I have just got a line on the Fairmont that I can give you." After some conversation in which it was disclosed that the building would be completed in October or November, defendant's agent agreed to take \$25,000.00 of the insurance. He asked the plaintiff's broker if he, the agent, would get the renewal, and the reply was "Sure, Henry." The Supreme Court held that this conversation did not create an oral contract of insurance.

In *Toth v. Metropolitan Life Insurance Co.*, 123 Cal. App. 185, 11 P. 2d 94, the court said:

"Hence our courts of last resort have adopted the rule that proof of such oral contracts must be clear and convincing to the effect that such contract was actually entered into, that each party understood it in the same light and in regard to the same subject matter and that the parties intended to contract in a manner not in the usual course of business. (14 Cal. Jur., p. 429.)"

In the same case, on page 191 of 123 Cal. App., the court said:

"There is some evidence to the effect that Thomas told decedent that, after the medical examination, he would be 'protected,' but there is no evidence to indi-

cate what was intended or understood by the word 'protected.' Applying the test prescribed by the California authorities in considering oral contracts of insurance and outlined above, the proof in the case at bar is neither clear nor convincing to the effect that such contract was actually entered into; or that each party understood it in the same light, or in regard to the same subject matter; or that the parties intended to contract in a manner not in the usual course of business."

While many other cases could be cited to the propositions enunciated above, it is unquestioned that the rules so laid down are the general rules, and since the matter is so thoroughly covered in the *K. C. Working Chemical Co.* case, which is the last expression of the California courts, we will not burden this brief by citation of further authorities not precisely in point or of cases from other jurisdictions other than to illustrate the points involved.

Disregarding our own version that all conversations had between Oelsner and the appellant prior to the loss related to the National Fire Insurance Company insurance only, and taking Plaintiff's statements and contentions at their face value, it is clear that any transactions had between Oelsner and Plaintiff prior to the loss did not even approach the dignity of a contract or contracts between appellant and appellees by which each party was mutually bound.

The most glaring deficiency in the transaction of communicated elements necessary to complete a contract is the fact that no party insurer was even mentioned. It is stipulated and conceded that Oelsner, in addition to

the two appellee companies, represented numerous other insurance companies. In the transaction as claimed by appellant, no company was designated as the insurer, even conceding that the alleged statement of Oelsner that "you are covered" constituted an agreement between appellant and Oelsner. There is no contention nor evidence that the appellant even knew that such companies as the appellees were in existence until long after the fire. The situation is identical with the situation in the case of *Ogle Lake Shingle Co. v. National Lumber Ins. Co.*, 122 Pac. 990 (Wash.). There the court said:

"(1) It is now well established that contracts of insurance may rest in parol. It is as well established that an oral contract for insurance is not enforceable, unless all the elements essential to a contract of insurance have in some manner been agreed upon. 'In other words, nothing can be left open for future negotiations with reference to the subject-matter, parties, rate of premium, amount or duration of risk.' 1 Cooley's Insurance Briefs, 368; Wood on Fire Ins. Sec. 5.

"(2) It will be admitted that the contract of insurance must have been complete at the time of the destruction of the mill on June 4th, or there can be no recovery. If it lacked any of the required essentials, it was not complete. Among these essentials is certainty of parties, and the risk insured against, in neither one of which particulars was there any designation or certainty at the time of the fire. Had Carstens & Earles been an insurance company, or representing only the two companies, in which the policies were subsequently written, it might be held that there was a certainty as to the parties to the contract. It is admitted that it represented sev-

eral other companies at the time of the fire. There is nothing in the correspondence nor in the testimony to indicate in what companies this insurance was to be placed. At the time the representatives of the shingle company called on Cutter to effect the insurance, he had no knowledge of the companies, other than as the names appeared on the letter heads of Carstens & Earles and in the circulars sent to him. They evidently made some inquiry as to the companies to carry the risk, as Cutter says in his testimony, 'I told them it would be placed in two good companies,' but that he could not tell them in what companies. 'I did not know exactly, so I left it all to their (Carstens & Earles) discretion in which companies to place it.' Under these circumstances, no contract existed as to any one of the companies represented by Carstens & Earles. And the first essential of a contract is lacking, in that there was no meeting of minds as to the parties to the contract. So far as we have been able to determine, all the authorities agree that, where an insurance agent represents several companies and there is no designation of the company to take the risk, there is no contract because of the failure of parties. *Hartford Fire Ins. Co. v. Trimble*, 117 Ky. 583, 78 S. W. 462; *Sheldon v. Hekla Inc. Co.*, 65 Wis. 436, 27 N. W. 315; *New Orleans Ins. Ass'n. v. Boniel*, 20 Fla. 815; *Kleis v. Niagara Fire Ins. Co.*, 117 Mich. 469, 76 N. W. 155; *John R. Davis Lumber Co. v. Scottish Union & Nat. Ins. Co.*, 94 Wis. 492, 69 N. W. 156; *Michigan Pipe Co. v. Michigan Fire Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277."

Of course, one of the essential elements of any contract is a meeting of the minds between *parties*. The Civil Code of California expresses this as follows:

“1550. ESSENTIAL ELEMENTS OF CONTRACT. It is essential to the existence of a contract that there should be:

- “1. Parties capable of contracting;
- “2. Their consent;
- “3. A lawful object; and,
- “4. A sufficient cause or consideration.”

Civil Code, Sec. 1550.

How, therefore, can it be said that appellant entered into a contract of insurance with the appellees when there is no showing whatsoever that the appellees were ever mentioned or even thought of at the time.

Plaintiff sues appellee, *Mercantile Insurance Company* for 5% of the loss and appellee, *The Reliance Insurance Company* for 7½% of the loss. There is no pretense that prior to the fire there was any such an agreement. In the *Ogle Lake Shingle Co.* case quoted, *supra*, the court, while speaking of segregation of property, had the following to say:

“The contract is lacking in another essential: There was no segregation or division of the risk insured against.”

The claimed agreement is lacking in another vital essential and that is there was no pretense of specifying the period during which the insurance was to continue. Not only is the alleged conversation deficient in this respect, but appellee, in answer to a direct question as to whether or not anything was said about the date from which he was covered, said that no such statement was had, that Oelsner merely said, “You are covered.” This, of course, is a vital element of the contract.

The Delivery by Defendants' Agent, Oelsner, to Plaintiff of the Two Policies in Question After the Fire Could Not Create a Contract of Insurance Retroactive to the Date of the Fire.

Again disregarding the clear import of all the facts that Oelsner's intent in delivering the policies to appellant over a month after the fire was not to effect or confirm contracts of insurance between appellant and appellees, but was for the purpose of aiding appellant in his negotiations with the *National Fire Insurance Company*, and again, for the purpose of this argument, taking this delivery as unqualified and accepting for the argument appellant's version, we have a situation where written contracts were presented after the subject of the contracts had been destroyed, and assuming, for the sake of argument, that the presentation of the contracts by Oelsner to appellant was an offer and that appellant accepted the offer, nevertheless, this did not constitute contracts of insurance relating back to the date of the fire.

This stems from the very essence of insurance. Insurance is not an agreement to pay a very small for a very greater sum, but, as defined by all of the books and embodied in our statutory law, is:

“Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event.”

California Insurance Code, Sec. 22.

The rule is well nigh universal that an insurance contract cannot be entered into insuring against a loss that has already occurred, and particularly against a loss of property that is no longer in existence.

The Supreme Court of California has directly passed upon this proposition, and in a case that has never been questioned or overruled.

In *Crawford v. Transatlantic Fire Insurance Co.*, 125 Cal. 609, 58 Pac. 177, the court, in discussing the effect of a policy delivered after a loss, says:

“The main question for determination was whether all the acts of said agents, taken together, amounted to an execution of the policy, so that it became obligatory on the defendant. If the policy—as the evidence for plaintiffs tended to show—was the memorial of a contract which in its essentials had been agreed upon by parol before the fire, and which the parties intended should take effect according to its terms on the 2d of May at noon, then certainly the subsequent delivery was sufficient to make the defendant liable on the instrument; its liability thereon probably attached even without actual delivery to the insured or his agent. (*Lightbody v. North American Ins. Co.*, 23 Wend. 18; *Davenport v. Peoria Etc. Ins. Co.*, 17 Iowa 176; *Franklin Insurance Co. v. Colt*, 20 Wall. 560; *Yonge v. Equitable Etc. Soc.*, 30 Fed. Rep. 902.) If, however—as the evidence for defendant tended to show—there had been before the fire no agreement that defendant should insure the building and issue its policy accordingly, such an agreement as would have made Crawford liable for the premium, then it is equally plain that delivery of the policy after the building had been destroyed, to the knowledge of the parties, could not impart to the instrument any effect whatever. (Civ. Code, secs. 2527, 2528; *Clark v. Insurance Co.*, 89 Me. 26; *People v. Dimick*, 107 N. Y. 13.)”

Civil Code, Sections 2527, 2528, cited in the foregoing quotation, were carried into the Insurance Code by Section 22 of the Insurance Code, above quoted, and the citation of these sections illustrates the court's reasoning and the reasoning for the rule that insurance is not and cannot be against a known loss, but only against a contingent or unknown event.

As said in the case of *Continental Insurance Co. v. Stratton*, 215 S. W. 416 (Ky.):

“A revival of the contract of insurance can be operative only from the instant that it took effect, and the policy became rejuvenated and alive. It could not relate back, because a contract of insurance can only look forward, and never retrospectively.”

The case of *Crawford v. Transatlantic Fire Insurance Co.*, 125 Cal. 609, quoted above, is apparently the only case in California where the subject under discussion has been precisely raised, that is, where there was in direct issue the question of the effect of a delivery of a policy after the destruction of the property where there was in issue a controversy as to whether or not there had been a previous oral mutual meeting of the minds; but the question decided and the law laid down is almost universally followed.

The proposition that an insurance contract must act upon property *in esse* has been touched upon by other California cases and the general rule followed.

In *Royal Insurance Co. v. Smith*, 77 F. 2d 157 (9th Circuit), the court said:

“* * * If insurance is written upon an object which has no existence, it is void, irrespective of the knowledge of the parties. *Union Ins. Co. v. Ameri-*

can Fire Ins. Co., 107 Cal. 327, 40 P. 431, 28 L. R. A. 692, 48 Am. St. Rep. 140; *Crawford v. Trans-Atlantic Fire Ins. Co.*, 125 Cal. 609, 58 P. 177. It would be a violation of the principles which have always governed placement of insurance, and a sound public policy, to permit recovery where there was no insurable interest, *Hessen v. Iowa Auto. Mutual Ins. Co.*, 195 Iowa 141, 190 N. W. 150, 30 A. L. R. 657, even if the parties had agreed thereto. If enforceable, such a policy would be a legal wager."

In *Union Insurance Co. v. American Fire Ins. Co.*, 107 Cal. 327, 40 Pac. 431, cited in the foregoing quotation, the court said:

"3. If there are no circumstances indicating the intention of the parties, and no time is specified in the contract the risk will be deemed to have commenced at the date of the contract.

"4. In the case last mentioned, if, before the contract of insurance is made, the property had ceased to exist, although unknown to the parties, the risk never attaches."

In other types of insurance cases, however, the California Supreme Court has followed the same rule. In the case of *Western Indemnity Co. v. Industrial Accident Com.*, 182 Cal. 709, 190 Pac. 27, a compensation insurance case, the Supreme Court of California has the following to say:

"The general rule covering this question is thus stated in Cooley's Briefs on Insurance, volume 1, at page 354: 'It may * * * be regarded as elementary that an agent has no authority to insure goods

which he knows to have already been destroyed by fire.' And this rule finds support in the following cases: *Mead v. Phenix Ins. Co.*, 158 Mass. 124, (32 N. E. 945); *Clark v. Insurance Co. of North America*, 89 Me. 26, (35 L. R. A. 276, 35 Atl. 1008); *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65. And in *Waterloo Lumber Co. v. Des Moines Ins. Co.*, 158 Iowa 563, (51 L. R. A. (N. S.) 539, 138 N. W. 504), the court said: 'It has frequently been held that an agent has no authority to insure property already destroyed. * * * (See, also, *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421; 28 Cent. Dig. 703; 11 Dec. Dig. (Ins.) 127.) The principle laid down in these authorities is equally applicable to compensation insurance.

"Whether or not the insurer, under all the circumstances, could have issued a policy which covered the loss—either total or partial—the authorities we have cited sustain the proposition that, unless there is a subsisting contract of insurance when the loss occurs, a general agent, in the absence of express authority, has no power to issue a policy. We think it has been made clear that in this case there was no contract in force at the time of the injury. One was written on the day following the loss, but was never 'issued' until it was delivered to Smith on October 9th. Before that time the date of the application had been changed from September 25th to October 3d and the policy from October 3d to September 25th.

"The following authorities are cited in the brief filed by the respondent commission in support of the proposition that a general agent has authority to issue a policy covering a known loss and binding on his principal: *New York Ins. Co. vs. Russell*, 77 Fed. 103, (23 C. C. A. 43); *Insurance Co. v. Colt*,

87 U. S. (20 Wall.) 560, 567, (22 L. Ed. 423); *Eames v. Home Ins. Co.*, 94 U. S. 621, (24 L. Ed. 298; see, also, Rose's U. S. Notes); *Schultz v. Phoenix Ins. Co.*, 77 Fed. 374, 392; *Kennebec v. Augusta Ins. Co.*, 6 Gray (Mass.) 204; *Warner v. Peoria Etc. Ins. Co.*, 14 Wis. 345; *Komula v. General Assur. Co.*, 165 Wis. 520, (162 N. W. 919). These authorities are distinguishable from the case here in that in each of them, *prior to the loss*, the insured had signified his acceptance of the terms offered by the insurance company and thus a contract of insurance had been concluded. No authority has been cited, and we are aware of none, holding that a general agent, unless specially authorized, may issue a policy for a known loss where the terms of the contract of insurance had not already been settled upon.

“(7) The general rule is that whenever the parties have entered into a contract before the loss occurs or the policy has been issued, unless the authority of the general agent is expressly delimited, the policy, when issued, by operation of law relates back to the application and is dated accordingly—the policy being thereafter merely evidence of the contract; but this general rule has no application where the parties were not under contract at the time of the injury, and the general agent is without special authority to issue a policy to cover the loss.”

The reason for the rule announced in the above cited and quoted California cases is well stated in the case of *Alliance Ins. Co. v. Continental Gin Co.*, 285 S. W. 257 (Tex.). In that case the court said:

“(1) Property *in esse* (with exceptions immaterial here) is the basis of a contract of or for fire insurance. A substantial element is the chance of

loss. If either thing be absent (*i. e.* if there be no property originally or chance of loss be precluded by the certainty incident to pre-occurring fire), the insurance company is in the absurd position of freely offering to pay a large and certain sum (here \$10,500) if the insured will pay to it the comparatively insignificant amount of the premium (here, \$341.20). Stated another way: In consideration of present payment by one party of the rate named, the other party agrees to pay a larger sum if, and when, a contingency happens; if the contingency does not happen, the one loses the small sum; if it does happen, the other loses the large sum (reduced by the smaller one); and it is entirely nonpermissible to assume that the parties intended to make, or did make, a contract requiring payment of the larger sum if either, or both, of them knew that the contingency, nominally *in futuro*, had already occurred. When good faith of both parties is assumed and the property does not exist, there is a mutual mistake of fact as to the very subject-matter of the agreement; if the insurer acts in good faith, but the insured knows of the previous destruction, there is present avoiding fraud. *Kline Bros. & Co. v. Royal Insurance Co.* (C. C.) 192 F. 378, and authorities there cited; *Norwich Union v. Dalton* (Tex. Civ. App.) 175 S. W. 459. The business of fire insurance has acquired quasi public aspects. Rate regulation has proceeded to the point where improper payment of losses substantially affects the well-nigh common burden. And because of these things, it is our opinion that public policy would inhibit the making or enforcement of an insurance contract in relation to imaginary property, even where both parties so intend.

“There was no contract of any kind, therefore, in existence as between the Alliance Insurance Company and the assureds at the time of the loss. Afterward there was no property about which an enforceable contract could be made. The fire terminated the offer to contract which was then, through Sellers as agent of that company, being tendered, because it cut off possibility of subject-matter for a contract.”

In *City of New York Ins. Co. v. Jordan*, 284 Fed. 420, the court said:

“‘An agent of an insurance company has no authority to insure property already destroyed; and a policy written and intended as a substitute for a subsisting policy in another company, but not delivered, and of which the assured has no knowledge until after the property is destroyed by fire, is not a valid contract of insurance.’ *Stebbins v. Insurance Co.*, 60 N. H. 65; *Kerr v. Milwaukee Mechancis’ Ins. Co.*, 117 Fed. 442, 54 C. C. A. 616.”

In the case of *Clark v. Insurance Co. of North America*, (Me.) 35 Atl. 1008, the court said:

“There was no contract between this plaintiff and the defendant company at the time the loss occurred. There was a subsisting contract between the plaintiff and the Commercial Union. The unauthorized attempt on the part of the agent of the defendant company to make such a contract by entering in his ‘daily report’ the memorandum of such contract was not enough. The contract of insurance is to be tested by the principles applicable to the making of contracts in general. The terms of the contract must have been agreed upon. This necessarily implies the action of two minds, of two contracting parties. If it is incomplete in any material particular,

or the assent of either party is wanting, it is of no binding force.

“Thus, in the case of *Insurance Co. v. Young*, 23 Wall. 85, 107, the supreme court of the United States, in speaking of the contract of insurance where a question similar to the one under consideration arose, say: ‘The company assented to the policy, but the applicant never did. The mutual assent, the meeting of the minds of both parties, is wanting. Without it there is none, and there can be none.’ *Insurance Co. v. Ewing*, 92 U. S. 377, 381.

“In this case the action of the agent in the transaction relative to the attempted change of risk to the defendant company was entirely *ex parte*. If we assume that he was acting with authority from the company, it was then no more than a proposition which had not been made known to the plaintiff. To give it validity required his knowledge and his consent. At the time of the loss, knowledge had not been conveyed to him, and his acceptance had not been given. The rights and liabilities of the parties are to be determined by their legal status at the time of the loss. It is inconceivable that the defendant company can be held liable for indemnity against loss when no contract for indemnity existed at the time the loss occurred.

“And if the property had been burned before any contract was entered into with the defendant company, even if we assume such contract to have been afterwards made, that fact was known to the agent, and the defendant company would not be liable. The property must be in existence to render a contract of insurance valid. *Stebbins v. Insurance Co.*, 60 N. H. 65; *Mead v. Insurance Co.*, 158 Mass. 124, 126, 32 N. E. 945.”

In many of the cases cited the question of the meeting of minds necessary to constitute a valid contract and the effect of delivery after the fire has risen in situations where an agent for insurance companies, at the request of one of the insurance companies, had attempted to cancel a subsisting policy and substitute for it a policy of another insurer, usually the defendant in the case cited. The *K. C. Working Chemical Co.* case, cited and quoted from *supra*, is typical. In these cases one of the elements involved and frequently discussed is the authority of the insurance agent to act as agent for the assured in cancelling one policy and substituting another. But not even that element is present in this case as it has been stipulated that Oelsner was acting as agent for the appellees and was not the agent for the appellant in any respect, and the record is clear that Oelsner did not and did not attempt to cancel or reduce, which would amount to a partial cancellation, the *National* policy before the fire or substitute or add the appellees' policies thereto. The record is clear that he procured the appellees' policies in contemplation of an eventual reduction in the *National* policy and to be used only if and when that reduction was made by proper communication and assent of the appellant and the securing of commitments from sufficient other insurers to round out the necessary amount of insurance, and that he took no steps, nor did the *National* take any steps by communication with the appellant to in any way disturb or interfere with the coverage afforded by the *National* policy, which was 100%.

As above stated, we have proceeded with this argument on the basis of the admitted facts only, and from those admitted facts there is no question but that there never was any meeting of the minds between appellant and

appellees for insurance in the appellee companies, in other words, there never was a meeting of the minds before the fire. There is entirely lacking that essential of a contract of insurance, to wit, parties capable of contracting, and an offer communicated and an acceptance communicated, before the fire.

“1565. ESSENTIALS OF CONSENT. The consent of the parties to a contract must be:

1. Free;
2. Mutual; and,
3. Communicated by each to the other.”

Civil Code, Sec. 1565.

Nor was there any offer after the fire to insure or to insure property already destroyed. When Oelsner delivered the policies to appellant over a month after the fire, he accompanied it with the documents attached to Oelsner's affidavit on file herewith consisting of the questions and answers, his letter to the *National Fire Insurance Company*, and the questions and answers given to the *National's* attorney. These communications make it clear that he was not proposing to appellant then an insurance contract for appellant's acceptance, but was explaining a past transaction and explicitly pointing out that there had been no disturbance of the *National* policy prior to the loss and that the purpose of procuring the appellees' policies was only part of his efforts to procure commitments from insurance companies to present to appellant if and when the *National* policy was cancelled

or reduced. And if the appellant would take this delivery of the policies and the documents as a proposal, he would, of course, be compelled to accept in the terms offered, to wit, that there had been no change prior to the fire.

Obviously, if Oelsner could, as is apparently contended by appellant, by his *ex parte* action without appellant's knowledge or consent, insure appellant by companies represented by him and commit the appellant to the payment of a premium, then certainly, by the same token, he could cancel appellant's existing insurance and leave him without protection. In this regard, a statement made by the Supreme Court of Washington in the case of *Tacoma Lumber & Shingle Co. v. Fireman's Fund Ins. Co.*, 151 Pac. 91, is pertinent:

“* * * We cannot subscribe to the doctrine that a fire insurance agent is such an agent of the insured that notice to him of the cancellation of a policy by the insurer is notice to the insured, nor that an attempt to cancel a policy pursuant to such notice without compliance with the terms of the statute or the stipulations of the policy will work a cancellation. The protection of an insurance policy would be precarious indeed if such should be held to be the law. Neither reason nor authority will sustain such a contention. (Citing many cases.)

“It is self-evident that, since the cancellation of the first policy was invalid, the risk of the second did not attach. Undoubtedly the insured may waive notice of cancellation, since such provision is for his benefit, and may acquiesce in the substitution of policies; but the mere receipt of a second policy after the fire cannot be such a waiver, since the rights of

the parties can only be determined as of the time of the fire.”

See also:

Royal Exchange Assur. of London v. Luttrell,
63 P. 2d 1240 (Colo.).

We have not discussed the claim of appellant that he compromised with the *National Fire Insurance Company*, which we believe is contrary to the facts as disclosed by appellant's own witnesses, for the reason that we believe it wholly immaterial, but whether the *National* fulfilled their contract in exact accordance with its terms, as is our contention, or whether there was a compromise between the Plaintiff and the *National*, could not affect these Defendants. In the case of *McGill v. Commercial Union Assur. Co.*, 5 F. 2d 589, the court, speaking of a similar situation, said:

“* * * Evidently neither waiver by the insured in favor of the Home Company nor even an express agreement between the agent and the insured for cancellation of the Home Company's policies and substitution of the Commercial Union policy after the fire could bind the latter company, because its policy was to be issued upon property in existence, and after the cancellation of the policies of the Home Company.”

In concluding this phase of our brief, we would like to pose a question. At just what precise point of time did the contracts of insurance take effect? Clearly, they could not have taken effect before the fire as neither

appellant nor anyone acting for or in his behalf had any notice or knowledge of them or of any of the facts relating thereto until on or about the 17th of May, 1947, after the fire. [Stip. of Facts, paragraph XIV; Tr. Vol. 1, p. 25.] At what point did the appellant become bound to accept the contracts and pay a premium therefor? Clearly not before the fire because he knew nothing about them. Could appellant have refused to accept the contracts when, as appellant claims, they were tendered to him on May 17th, after the fire? He certainly could have as he knew nothing about them until that date.

“The burden of proof is upon the party alleging its existence to show by satisfactory evidence *that the negotiations were concluded, and the contract in fact made by which the parties became mutually bound; an infallible test is to determine whether both parties are bound.*”

John R. Davis Lbr. Co. v. S. U. & N. Ins. Co.,
69 N. W. 156 (Wis.).

In *Vance on Insurance*, page 213, section 70, the author states:

“From the necessity of mutuality in all contracts it follows that the policy in the hands of the agent cannot be binding on the insurer unless it is also binding on the insured. If the insurer is liable in case of loss, the insured is liable to pay the stipulated premium. *Hence, when the insured has the privilege of rejecting the policy upon delivery, he cannot hold the insurer liable until actual delivery and acceptance of the policy.*” (Citing cases).

Appellant's Contention That,

- (A) There Was a Constructive Delivery Before the Fire,
- (B) There Was Actual Delivery After the Fire and Acceptance by Appellant,
- (C) There Was a Demand for Payment of Premium.

Taking up appellant's contentions in their order, we will first notice the claim that there was a constructive delivery of appellee's policies before the loss occurred.

Clearly, in view of the authorities heretofore cited to the effect that there was no contract before the loss (or after, either) and no meeting of the minds thereon, and since, as these cases show, the written policy is merely a memorial of the contract or meeting of the minds, there could be no delivery, constructive or otherwise, before the loss. As above demonstrated, it would make no difference whether there was a policy or not, or whether it was delivered before or after the loss, if there was a contract or meeting of the minds.

Appellant cites but one case to this effect (*Hill v. Industrial Accident Comm.*, 10 Cal. App. 2d 178), and we do not believe that he is very serious in his contention.

In the *Hill* case there was a contract, as shown by the statement of the facts on page 181 of 10 Cal. App. 2d. Mortensen was a collecting agent for the insurance company. Hill applied to him for a policy of employer's liability insurance. The soliciting agent forwarded the application to the insurance company in San Francisco and the policy was written and sent by mail to the agent in Bakersfield. The agent met the assured on the street

and told him the policy had been received and the assured told the agent to hold the policy for him in his office until he called for it, and the agent agreed. There was a complete contract long before the loss here.

Moreover, the quotation which appellant in his brief presents in support of his contention is not complete. In fact, the real rule is contained in the same paragraph from which appellant quotes and in the three sentences immediately preceding the portion which appellant quotes, the court says.

“‘A policy is constructively delivered when, by agreement of the parties at the time of execution, it is understood to be delivered, and under such circumstances that the insured is entitled to immediate delivery. Constructive delivery is a matter of intention. If it was intended that the policy should be in force before it actually reached the hands of the insured, it will be deemed constructively delivered.’”

The undisputed and stipulated facts in this case show that there was no intention to deliver these policies before the loss, or at all, until Oelsner had procured commitments for other insurance and the *National* policy had been reduced to 35% of \$200,000.00 and the appellant had been notified and acquiesced therein.

Appellant's next contention is that delivery of the policy after the loss and acceptance thereof by the assured made the policy effective for all purposes.

He says that insurance issued without the knowledge of the insured may nevertheless be ratified and accepted by him when the same comes to his knowledge, even after the loss. This statement, of course, begs the question

and disregards the admitted facts that there was no insurance before the loss and therefore nothing to be ratified, and furthermore that there was no person acting for or in his behalf whose acts he could ratify. Oelsner was not his agent and did not purport to be.

In *Ellison v. The Jackson Water Company and Bayerque*, 12 Cal. 542, the court, at page 551, said:

“It cannot in strictness be said that Bayerque ‘adopted and ratified’ the contract between the plaintiff and the company. These terms are properly applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent. No such relation existed between the company and Bayerque; the contract between it and Ellison was not made in Bayerque’s name, or for his benefit, or upon any authority from him.”

In *Watkins v. Clemmer*, 129 Cal. App. 567 (19 P. 2d 303) the court said, at page 570:

“A ‘ratification can only be effectual between the parties, when the act is done by the agent *avowedly for or on account of the principal, and not when it is done for or on account of the agent himself, or of some third person.*’ The quotation is from Story on Agency, seventh edition, section 251a, and the emphasis is ours. The learned author then makes the following comment: ‘This would seem to be an obvious deduction from the very nature of a ratification, which presupposes the act to be done for another, but without competent authority from him; and therefore gives the same effect to the act as if it had been done by the authority of the party for

whom it purported to have been done and as his own act.' Mr. Mechem at section 347 of his work on Agency defines ratification as 'the subsequent adoption and affirmance by one person of an act which another, without authority, has previously assumed to do *for him while purporting to act as his agent*'."

In *Schweitzer v. Bank of America*, 42 Cal App. 2d 536 (109 P. 2d 441), the court, at page 542, said:

"* * * But a ratification can occur only by approving the act of the agent after the agent performs openly on behalf of his principal and not for himself. It is the subsequent adoption by one claiming benefits of an act which, without authority, another has voluntarily done while ostensibly acting as agent of him who affirms the act and who had the power to confer authority."

In our present case there was no agent acting for, or assuming to act for appellant, whose acts appellant could ratify, (b) nor was there anyone else acting for or in appellant's behalf whose acts he could ratify [Stip. par. XIV, Tr. Vol. 1, p. 25]. Oelsner was not his agent, as is stipulated, and no one else was appellant's agent. Whose acts could plaintiff adopt or ratify?

As we have seen from cases cited under the other section of this brief, there was no contract to ratify or adopt, as there was no meeting of the minds between anybody on a contract.

Again, if appellant could ratify, as he claims, the act of Oelsner, he must ratify it *en toto*, and Oelsner's act as testified to by Oelsner, who is the only one who could possibly know, was the procuring of the policies of appellees for the purpose of using them at some future

date if and when the *National* policy was reduced and Oelsner had procured additional insurance, and all these facts had been communicated to the appellant. It is fundamental that one cannot adopt the acts of another without adopting them *en toto*.

As said in the case of *Alliance Ins. Co. v. Continental Gin Co.*, 285 S. W. 257 (Tex.), quoted above to the other point in this brief, the court, now speaking of a claim of ratification of a contract that had not been in existence before the fire, said:

“(2) A *fortiori*, ratification (rather, adoption) after destruction of the property of that which before the disaster was not a contract of or for insurance is an attempt to do by indirection that which cannot be directly done. The authorities (cases and text-books) cited, *contra*, may generally be distinguished and, thus, rendered inapplicable upon these grounds: (a) They had to do (or were predicated upon cases having to do) with marine insurance under the English law, contracts governed by principles different from those which apply to fire insurance, as pointed out in *Norwich Union v. Dalton*, *supra*, and in *Kline Bros. & Co. v. Royal Insurance Co.*, *supra*, and as is disclosed, also, in the English case of *Grover v. Matthews* (1910), 2 K. B. 401, 79 Law J. K. B. (N. S.) 1025, 102 Law T. (N. S.) 650, 26 Times L. R. 411, 15 Com. Cas. 249. (b) Or they involved or referred to contracts of some kind, and at worst merely voidable, which had been so far consummated as to take effect prior to the loss by fire, *e. g.* *Dalton v. Norwich Union*, as considered and given disposition by the Commission of Appeals (213 S. W. 230). Except as thus distinguishable, and so far else as any of them may be relevant to the question now before us, we do not believe the cited precedents rest upon sound reasoning. We do

not have here a case which involves a contract that is merely voidable; but we do have one where there was a valid contract entered into before the fire (and without need of ratification as in *Dalton v. Norwich Union* last, *supra*) or where there was no contract at all prior to the loss in which situation attempted ratification was useless."

Appellant's Cases on This Point.

Appellant lays great stress on *Ferrar v. Western Assurance Co.*, 30 Cal App. 489 (159 Pac. 609), and quotes from that case, a short excerpt, which is obviously *dicta*, to the effect that a ratification may be made subsequent to a loss.

In that case there had been entered into previous to the loss a complete oral contract of insurance negotiated between one, Coleman, agent for the assured, and the manager of the defendant corporation. Coleman was the plaintiff assured's agent and acted for her and assumed to act for her and made the contract by written application and acceptance with Miller acting for and assuming to act for the insurance company. The court said that they had no doubt that the property was covered by a parol contract of insurance at the time of the fire, and further found that Coleman was the general agent of the assured plaintiff.

What was said regarding ratification was mere *dicta* and wholly unnecessary since the contract had been completed between competent parties before the fire. Even so, the *dicta* merely pronounces the settled rule of law. If Coleman were not the assured's general agent, but had limited authority and assumed greater authority and entered into a contract with the insurance company, she,

of course, could ratify his acts after the event. But, this statement in itself was not necessary for the decision and was *dicta*, as shown by the language of the Supreme Court in denying a petition to have the case heard in the Supreme Court, where the Supreme Court, on page 494 of 30 Cal. App., says:

“The application for a hearing in this court after decision by the district court of appeal of the first appellate district is denied.

“In denying the application we deem it proper to say that we do not express any view on the question of ratification discussed in the opinion. A decision on that question is not essential to a determination of the case, in view of what is correctly held in the opinion as to the status and authority of Coleman.”

The case of *Hayward Lumber Etc. Co v. Lyders*, 139 Cal. App. 517 (34 P. 2d 805), cited by plaintiff, decides nothing. It is an isolated statement in the opinion of what the appellant therein contended and the court picks it up and drops it just as it is quoted in appellant's brief and no decision was based thereon, but the court in the final analysis did find against appellant.

In the case of *Kleiber Motor Truck Co. v. International Indemnity Co.*, 106 Cal. App. 709 (289 Pac. 865), the party who procured the insurance and whose acts were sought to be ratified by the plaintiff was required by contract to keep a truck insured for the benefit of plaintiff. The court said, on page 717 of 106 Cal. App., that he acted in part for himself and in part as an agent and representative of the plaintiff in procuring the insurance. In other words, he made a contract with the defendant insurance company, acting and assuming to act on behalf of the plaintiff, and the court held that,

whether or not the plaintiff had vested him with such authority prior to the loss, he could ratify his assumption to act for him after the loss, which is in line with all theories of ratification.

In both of the other cases cited, *Hooper v. Robinson* and *Phoenix Ins. Co. v. Hancock*, in the quotation in appellant's brief, the party assuming to act had entered into a valid contract of insurance with himself on one hand and the insurance company on the other, which contracts were for the benefit of third parties and were assumed to be for the benefit of third parties who could ratify the same, even after loss.

Finally, Appellant Claims That Appellees, by Demanding and Accepting the Premiums After Loss, Are Estopped to Deny That Their Policies Were Effective.

Aside from the fact that the statement in this premise is not true and that appellees never demanded or got a premium from appellant, and appellant's own affidavit shows that whatever charge was made against him by Oelsner has been wiped off by Oelsner crediting his account, the contention made by plaintiff on this point is wholly without merit.

It is fundamental that, while in proper circumstances estoppel may arise to prevent the forfeiture of a contract, estoppel alone can never create a contract or primary liability. Illustrative cases are:

Belt Auto Indemnity Assn. v. Ensley Transfer & Storage Co., 99 So. 787;

Nitche v. Security Benefit Assn., 255 Pac. 1052 (Mont.);

Macomber v. Mpls. Fire & Marine Ins. Co., 204 N. W. 331 (Wis.);

Standard Accident Insurance Co. v. Roberts, 132 F. 2d 794;

Ruddock v. Detroit Life Ins. Co., 177 N. W. 242, 248 (Mich.);

Peters v. Great American Ins. Co., 177 F. 2d 773.

The only case cited by appellant in support of this remarkable contention is *Hill v. Industrial Accident Comm.*, 10 Cal. App. 2d 178. As heretofore pointed out in discussing this case under another heading, in the *Hill* case there was a contract that had been completely executed by offer and acceptance and the language used by appellant in his brief is merely pointing toward the evidentiary effect of the billing for the premium.

The matter, as to whether or not collecting a premium after the loss will have any effect upon creating the contract, has been passed upon many times in California.

In *Strauss v. Dubuque Fire & Marine Ins. Co.*, 132 Cal. App. 283 (22 P. 2d 582), the court on page 294 said:

“(7) The Plaintiffs call attention to the mailing of the check, its retention by the defendants, and the examination of the plaintiffs on the request of the defendants. Thereupon they assert that the defendants are estopped from making any defense. Regarding the examination of the plaintiffs under oath that subject is covered by the language of the policy, which distinctly provides that the procedure mentioned will not constitute a waiver. Regarding the transmission and retention of the check, it will be remembered that those incidents occurred after the

fire. They did not create a waiver nor an estoppel. (*McCormick v. Orient Ins. Co.*, 86 Cal. 260, 262 (24 Pac. 1003); *Goorberg v. Western Assur. Co.*, 150 Cal. 510, 518 (89 Pac. 130, 119 Am. St. Rep. 246, 11 Ann. Cas. 801, 10 L. R. A. (N. S.) 876).)"

In *Hargett v. Gulf Ins. Co.*, 12 Cal. App. 2d 449 (55 P. 2d 1258), the court at page 456 said:

"(6) The fact that the premium was paid to and accepted by the Monarch company within a few days after the fire and was not returned in whole or in part to plaintiff is not important and has no tendency to affect the rights of that company in the present litigation. The rights of the parties were fixed at the time of the loss. The insurance was not then in force but it had been in force before the chattel mortgage was given, and the company was entitled to the premium. (Civ. Code, secs. 2616 and 2618, then in force; *Gilmore v. Eureka Casualty Co.*, 123 Cal. App. 20 (10 Pac. 2d 810).)

"(7) Even though at the time the premium was paid to the Monarch company the company had actual knowledge of the existence of the chattel mortgage, which fact does not appear to have been established, the property had already been destroyed. Plaintiff must rely entirely upon the doctrine of estoppel to foreclose the defenses interposed by this company; obviously no estoppel could have arisen after the destruction of the property. An estoppel arises when the assured, because of some act or conduct of the insurer, has been dissuaded from obtaining other insurance upon the property and has proceeded to rely upon the validity of the policies he holds. Plaintiff was not, nor could he have been, prejudiced in any way by the acceptance and reten-

tion of the premium by the Monarch company after the destruction of the property. The evidence of plaintiff in the particulars we have pointed out falls far short of establishing an estoppel against any of the companies to rely upon the provisions of the policies, under which the property destroyed by the fire was not at the time covered by insurance."

See also:

Goorberg v. Western Assur. Co., 150 Cal. 510, 89 Pac. 130;

General Accident F. & L. Corp. v. Industrial Accident Comm., 196 Cal. 180, 237 Pac. 33.

Conclusion.

In conclusion appellees respectfully submit that there were no material disputed facts to warrant a judgment for appellant and that the undisputed facts entitled appellees to judgment in their favor as a matter of law, and the trial court's judgment should be affirmed.

Respectfully submitted,

HINDMAN & DAVIS,

By E. EUGENE DAVIS,

Attorneys for Appellees.

No. 12609

United States
Court of Appeals
for the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
vs.
SIGVALD NIELSON and MADGE NIELSON,
Respondents.

Transcript of Record

Petitions to Review Decisions of the Tax Court
of the United States.

FILED

NOV - 14 1950

PAUL R. O'BRIEN
CLERK

No. 12609

United States
Court of Appeals
for the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

SIGVALD NIELSON and MADGE NIELSON,

Respondents.

Transcript of Record

Petitions to Review Decisions of The Tax Court
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

HARRY R. HORROW, ESQ.,

ALBERT J. SHULTS, ESQ.,

MURRAY GARTNER, ESQ.,

JOSEPH L. SELIGMAN, JR., ESQ.,
For Petitioner.

EARL C. CROUTER, ESQ.,
For Respondent.

Docket No. 21103

SIGVALD NIELSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1948

- Dec. 3—Petition received and filed. Taxpayer notified. Fee paid.
- Dec. 6—Copy of petition served on General Counsel.
- Dec. 3—Request for Circuit hearing in San Francisco, filed by taxpayer. 12/10/48 Granted.

1949

- Jan. 4—Answer filed by General Counsel.
- Jan. 10—Copy of answer served on taxpayer. San Francisco Calendar.
- Sept. 9—Hearing set Nov. 7, 1949—San Francisco, California.
- Nov. 7—Hearing had before Judge Harron on merits. (Submitted by Stipulation.) Consolidated with Dkt. 21104 for hearing. Stipulation of facts with joint motion for consolidation—granted; filed at hearing. Copies served. Appearance of Seligman, Jr., as counsel filed. Briefs due 12/22/49. Reply briefs 1/16/50.

1949

Dec. 7—Transcript of hearing 11/7/49 filed.

Dec. 19—Motion for extension to 1/21/50 to file brief, filed by taxpayer. 12/20/49 Granted.

Dec. 21—Brief filed by General Counsel.

1950

Jan. 16—Motion for extension to 2/20/50 to file opening brief, filed by taxpayer. Granted.

Jan. 26—Memorandum findings of fact and opinion rendered. Judge Harron. Decision will be entered that there are no deficiencies.

Jan. 27—Decision entered. Judge Harron. Div. 13.

Apr. 21—Petition for review by U. S. Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.

May 5—Proof of service of petition for review on taxpayer filed.

May 5—Proof of service of petition for review on counsel for taxpayer filed.

May 24—Motion for extension to July 20, 1950, to prepare and transmit record, filed by General Counsel.

May 24—Order enlarging time to July 20, 1950, to prepare and transmit the record, entered.

July 3—Statement of points filed by General Counsel with service acknowledged thereon.

1950

July 3—Statement re diminution of record filed by General Counsel with service acknowledged thereon.

Docket No. 21104

MADGE NIELSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1948

Dec. 3—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 6—Copy of petition served on General Counsel.

Dec. 3—Request for Circuit hearing in San Francisco, filed by taxpayer. 12/10/48 Granted.

1949

Jan. 4—Answer filed by General Counsel.

Jan. 10—Copy of answer served on taxpayer. San Francisco Calendar.

Sept. 9—Hearing set Nov. 7, 1949—San Francisco, California.

Nov. 7—Hearing had before Judge Harron on merits. (Submitted by Stipulation.) Consolidated with Dkt. 21103 for hearing.

1949

Stipulation of facts with joint motion for consolidation—granted; filed at hearing. Copies served. Appearance of Seligman, Jr., as counsel filed. Briefs due 11/22/49. Reply briefs 1/16/50.

Dec. 7—Transcript of hearing 11/7/49 filed.

Dec. 19—Motion for extension to 1/21/50 to file brief, filed by taxpayer. 12/20/49 Granted.

Dec. 21—Brief filed by General Counsel.

1950

Jan. 16—Motion for extension to 2/20/50 to file opening brief, filed by taxpayer. Granted.

Jan. 26—Memorandum findings of fact and opinion rendered. Judge Harron. Decision will be entered that there are no deficiencies.

Jan. 27—Decision entered. Judge Harron. Div. 13.

Apr. 21—Petition for review by U. S. Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.

May 5—Proof of service of petition for review on taxpayer filed.

May 5—Proof of service of petition for review on counsel for taxpayer filed.

May 24—Motion for extension to July 20, 1950, to prepare and transmit record, filed by General Counsel.

1950

May 24—Order enlarging time to July 20, 1950, to prepare and transmit the record, entered.

July 3—Statement of points filed by General Counsel with service acknowledged thereon.

July 3—Statement re diminution of record filed by General Counsel with service acknowledged thereon.

The Tax Court of the United States

Docket No. 21103

SIGVALD NIELSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated November 18, 1948, bearing symbols IRA :90-D: WBH, and as a basis for his petition alleges as follows:

1. Petitioner herein is Sigvald Nielson, with office address at 225 Bush Street, San Francisco 4, California, and residing at 1620 Cowper Street, Palo Alto, California. Petitioner filed his federal income tax return for the calendar year 1944 on a

cash receipts and disbursements basis with the Collector of Internal Revenue for the First District of California, at San Francisco, California.

2. The amount of tax in dispute is \$405.74, federal income tax for 1944.

3. The notice of deficiency, a copy of which is attached hereto marked "Exhibit A" and made a part of this petition, was mailed to petitioner on November 18, 1948.

4. The determination of taxes set forth in said notice of deficiency is based on the following errors:

(a) The Commissioner erred in determining that the petitioner's one-half community interest in his distributive share of \$2,504.16 in the fee of \$43,425 received by the firm of Pillsbury, Madison & Sutro from The Equitable Life Assurance Society of the United States was not subject to tax under the provisions of section 107 of the Internal Revenue Code.

(b) The Commissioner erred in holding that the petitioner's one-half community interest in his distributive share of said fee was subject to the normal tax and surtax rates applicable to the year 1944 instead of to a tax of \$97.44 under the provisions of section 107 of the Internal Revenue Code.

(c) The Commissioner erred in determining a deficiency in federal income tax for the year 1944 in the amount of \$405.74.

5. The facts upon which petitioner relies as a basis for this petition are as follows:

(1) Petitioner herein during all of the times herein mentioned was an attorney at law engaged in the practice of law in San Francisco, California. From November, 1935, to January 1, 1939, petitioner was employed by the law partnership of Pillsbury, Madison & Sutro, 225 Bush Street, San Francisco, California. His compensation during said period was a fixed salary. Thereafter, from January 1, 1939, to May 1, 1942, petitioner was employed by said partnership with his compensation measured by a salary plus a percentage of the net profits of the partnership in each calendar year. On May 1, 1942, petitioner became a partner in said partnership, entitled to a distributive share of the net profits of said partnership.

(2) From August 4, 1935, up to and including May, 1943, said partnership rendered legal services to The Equitable Life Assurance Society of the United States. Petitioner, in his individual capacity as an employee of said partnership, from November, 1935, until May 1, 1942, and thereafter until completion of the said services, as a member of said partnership, participated in the performance of said services. In December, 1944, said partnership received a fee of \$43,425 from said The Equitable Life Assurance Society of the United States for said legal services. No income had been received by said partnership or by petitioner prior thereto by reason of said services rendered by said partnership. The distributive share of petitioner in said fee as a member of the partnership was \$2,504.16,

of which one-half, or \$1,252.08, was petitioner's share of the community income.

(3) In arriving at the deficiency involved in this proceeding the Commissioner erroneously held that said amount of \$1,252.08 was not subject to taxation under the provisions of section 107, on the ground that petitioner's right to receive income based on the services rendered to The Equitable Life Assurance Society of the United States did not exist for a period of thirty-six months or more.

(4) Petitioner, from January 1, 1939, to May 1, 1942, as an employee of said partnership, and from May 1, 1942, up to and including December, 1944, as a member of said partnership, participated in its net profits, and was from January 1, 1939, to December 31, 1944, entitled to receive income resulting from the services rendered by said partnership to The Equitable Life Assurance Society of the United States, and the community interest of petitioner in his distributive share of the income so received in 1944 was subject to the provisions of section 107 of the Internal Revenue Code. The tax attributable to said income, had it been included in the gross income of petitioner returnable over the period during which said services were rendered, is \$97.44 and the Commissioner erroneously determined that said income was subject to the normal tax and surtax applicable to the year 1944 in lieu of said tax of \$97.44.

Wherefore, petitioner prays that this court may hear this proceeding, redetermine the deficiency in-

volved herein by correction of the errors alleged herein, and grant such other relief as may be proper.

Dated: San Francisco, California, November 29, 1948.

/s/ HARRY R. HORROW,

/s/ ALBERT J. SHULTS,

/s/ MURRAY GARTNER,

Attorneys for Petitioner.

State of California,

City and County of San Francisco—ss.

Sigvald Nielson, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ SIGVALD NIELSON.

Subscribed and sworn to before me this 29th day of November, 1948.

[Seal] /s/ JOHN G. STAMP,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires September 28, 1952.

EXHIBIT A

SN-IT-1

Form 1230 (Rev. Sept. 1945)

Treasury Department
Internal Revenue Service

74 New Montgomery Street
San Francisco 5, California

Office of

Internal Revenue Agent in Charge

San Francisco Division

IRA:90-D:WBH

Nov. 18, 1948

Mr. Sigvald Nielson

225 Bush Street

San Francisco 4, California

Dear Mr. Nielson:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1944, discloses a deficiency of \$405.74, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner.

By /s/ F. M. HARLESS,
Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form 1276

Form Waiver

Statement

San Francisco

IRA:90-D:WBH

Mr. Sigvald Nielson

225 Bush Street

San Francisco 4, California

Tax Liability for the Taxable Year Ended December 31, 1944.

	Deficiency
Income tax	\$405.74

In making this determination of your income tax liability, careful consideration has been given to your protest filed May 3, 1948, and to the statements made at the conference held on June 7, 1948.

A copy of this letter and statement has been mailed to your representative, Messrs. Harry R. Horrow, Douglas Erskine and Murray Gartner, c/o Pillsbury, Madison & Sutro, 225 Bush Street, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

Adjustments to Net Income

Net income as disclosed by return, page 4,

line 3	\$11,245.58
--------------	-------------

Unallowable deductions and additional income:

(a) Partnership income	1,252.08
------------------------------	----------

Net income as adjusted.....	\$12,497.66
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Explanation of Adjustments

(a) It is disclosed that you received the amount of \$26,404.34 as your distributive share of income from the law partnership of Pillsbury, Madison & Sutro, San Francisco, California, of which your one-half community share is \$13,202.17. The amount of \$11,950.09 was reported as taxable income in the year 1944 and the remainder, \$1,252.08 was excluded from taxable income in the year 1944 as representing income for services attributable to prior years. You claimed relief under the provisions of section 107(a) of the Internal Revenue Code and added to your total tax for the year 1944 the amount of \$97.44, representing tax on income of \$1,252.08 attributable to prior years.

It is noted that you were employed by the partnership on a straight salary basis from November, 1935, to May 1, 1942, and on January 1, 1939, your compensation was increased by a small percentage of the profits. On May 1, 1942, you became a partner in the firm, thereafter participating in the net profits on a pro rata basis.

In December, 1944, the partnership received a fee of \$43,425.00 from the Equitable Life Insurance Company for services rendered for the period August 4, 1935, up to and including May, 1943, which period is more than thirty-six calendar months. As a member of the partnership you received \$2,504.16 as your share of the fee, of which your one-half community share is \$1,252.08.

It is held that prior to May 1, 1942, the income re-

ceived by you was that of an employee of the partnership; and prior to that date you did not have the right to participate in the fees received by the partnership from the Equitable Life Insurance Company.

In order to qualify for relief under section 107(a), *supra*, your right to receive income for prior services must exist for a period of thirty-six months or more. Since you were a member of the partnership for not more than thirty-two months (May 1, 1944, to December, 1944), it is held that you do not qualify for relief under the provisions of section 107(a) of the Internal Revenue Code. The amount of \$1,252.08 is held to represent taxable partnership income for the year 1944. The tax of \$97.44 on income attributable to prior years is, therefore, eliminated from your tax liability for the year 1944.

Computation of Tax

Net income	\$12,497.66	
Less: Surtax exemption	1,500.00	
Surtax net income	<u>\$10,997.66</u>	
Surtax on \$10,997.66		\$3,019.11
Net income	\$12,497.66	
Less: Normal tax exemption	500.00	
Normal tax net income	<u>\$11,997.66</u>	
Normal tax, 3% of \$11,997.66		359.93
Total tax		<u>\$3,379.04</u>
Add: (a) Tax attributable to prior years under section 107(a) of the In- ternal Revenue Code		0.00
Correct income tax liability		<u>\$3,379.04</u>
Income tax disclosed by return, page 1 - line 6 (Original, Account No. 9083227 First California District)		2,973.30
Deficiency of income tax		<u>\$ 405.74</u>
Received and filed T.C.U.S. December 3, 1948.		
Served December 6, 1948.		

[Title of Tax Court and Cause.]

Docket No. 21103

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4. (a), (b), (c). Denies that the determination of tax set forth in the notice of deficiency is based upon error as alleged in subparagraphs (a), (b) and (c) of paragraph 4 of the petition.

5. (1). Denies the allegations contained in subparagraph (1) of paragraph 5 of the petition, except it is admitted that during all of the times herein mentioned the petitioner was an attorney at law engaged in the practice of law in San Francisco, California.

(2). Denies the allegations contained in subparagraph (2) of paragraph 5 of the petition, except it is admitted that from August 4, 1935, up to and including May, 1943, the said partnership rendered legal service to The Equitable Life Assurance Society of the United States, and further admits that in December, 1944, the said partnership received a fee of \$43,425.00 from the said Equitable Life Assurance Society of the United States, and further admits that the distributive share of the petitioner in said fee as a member of the partnership was \$2,504.16, of which one-half was the petitioner's share of the community income.

(3), (4). Denies the allegations contained in subparagraphs (3) and 4) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

T. M. MATHER,
W. J. McFARLAND,
Special Attorneys,
Bureau of Internal Revenue.

Received and Filed T.C.U.S. January 4, 1949.

[Title of Tax Court and Causes.]

Docket No. 21103 and 21104

JOINT MOTION FOR CONSOLIDATION
OF PROCEEDINGS

Come now the parties in the above-entitled proceedings, by their respective counsel, and move for an order of the Court to consolidate for hearing, briefing and opinion said two proceedings in the case of Sigvald Nielson, Docket No. 21103, and the case of Madge Nielson, Docket No. 21104, and in support of this motion, the parties state as follows:

1. The case of Sigvald Nielson, Docket No. 21103, is on the hearing calendar at San Francisco commencing November 7, 1949, and involves the peti-

tioner's income tax liability for the calendar year 1944.

2. The case of Madge Nielson, Docket No. 21104, is on the same hearing calendar at San Francisco and involves the petitioner's income tax liability for the same taxable year.

3. Petitioners in the two cases are husband and wife and the issues of fact and law involved are identical.

4. The consolidation of these proceedings is in the interest of all concerned.

Wherefore, the parties jointly pray that the Court will grant this motion.

/s/ HARRY R. HAMM,

/s/ JOSEPH L. SELIGMAN, JR.,
Counsel for Petitioners.

/s/ CHARLES OLIPHANT,
E.C.C.

Chief Counsel, Bureau of
Internal Revenue.

Served November 7, 1949.

Filed T.C.U.S. November 7, 1949.

Granted November 7, 1949. Marion J. Harron,
Judge.

[Title of Tax Court and Causes.]

Docket No. 21103 and 21104

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the following fact shall be taken to be true and received as evidence for all purposes of this proceeding, subject to the right of either party to introduce any further evidence not inconsistent with or contrary to the facts herein stipulated.

1. Petitioners are individuals residing at 1620 Cowper Street, Palo Alto, California. They were married on September 27, 1924, and since 1929 they have at all times resided in and been domiciled in the State of California as husband and wife.

2. Petitioners each filed individual Federal income tax returns for the calendar year 1944 on a cash receipts and disbursements basis with the Collector of Internal Revenue for the First District of California.

3. The taxes in controversy herein are Federal income taxes for the year 1944 in the amount of \$405.74 in Docket No. 21103 and \$450.45 in Docket No. 21104.

4. Notices of deficiency, copies of which were attached to each petition herein as Exhibit A, were mailed to petitioners on November 18, 1948.

5. Petitioner Sigvald Nielson was employed as an attorney at law by the law partnership of Pills-

bury, Madison & Sutro, 225 Bush Street, San Francisco, California, in November, 1935, and has ever since been engaged in the active practice of law for and with said partnership. From the date of his employment to January 1, 1939, Sigvald Nielson received a fixed salary as compensation for his services, and thereafter until May 1, 1942, he received, during each calendar year, in addition to his fixed salary, a fixed percentage of the net profits of said partnership as follows:

1939	0.463%
1940	0.526%
1941	0.631%
January 1, 1942, to April 30, 1942..	0.631%

On May 1, 1942, Sigvald Nielson became a partner in said partnership, entitled thereafter to distributive shares of its net profits, and at all times material herein since said date he has been a partner in said partnership. Such distributive shares were as follows:

May 1, 1942, to December 31, 1942.	2.314%
1943	4.573%
January 1, 1944, to April 30, 1944..	3.5 %
May 1, 1944, to December 31, 1944	5.766%

6. From August 4, 1935, up to and including May, 1943, a period of ninety-four (94) months, said partnership rendered legal services to The Equitable Life Assurance Society of the United

States, hereinafter referred to as "Equitable," in connection with litigation growing out of the imposition by the State of California on a tax on gross premiums from insurance and annuities. These services were entirely distinct and separate from other legal services then being rendered to Equitable by said partnership and after the completion of these special services, said partnership received from Equitable \$43,425 as compensation for said services. Said compensation was received in a lump sum in December, 1944, and no other compensation was ever received by said partnership from Equitable for said services.

7. For many years past and during all of the years material herein, all fees received for legal services by said partnership have been pooled in a single fund, which has been first used to pay all expenses. The balance, representing the net profits of the partnership, has been distributed periodically among all of the partners and all of the employees entitled to share therein. The amount of such distributions has been computed on the basis of a quarterly allocation to the profit-sharing employees and a calendar year allocation to the partners of the profits of the partnership, all in accordance with the percentage shares agreed upon by the partners and in effect during the period in which the net profits were received. Each partner and profit-sharing employee has shared in such division of all profits received during any period in which he has been entitled to a share of the partnership profits accord-

ing to such agreement of the partners; conversely, when a partner or employee has ceased to be such by death or retirement or otherwise, he has not shared in any profit or profits received after the month in which the cessation has occurred.

8. At all times material herein, said partnership kept its books of account and filed its income tax returns on a calendar year and cash receipts and disbursements basis.

9. Sigvald Nielson's distributive share of said partnership's net income for the year 1944 included his distributive share in said Equitable fee in the amount of \$2,504.16. One-half of said distributive share, or \$1,252.08, was the community income of Sigvald Nielson and the other one-half was the community income of his wife, Madge Nielson.

10. In their Federal income tax returns for 1944 petitioners each claimed the benefits of section 107(a) of the Internal Revenue Code and reported therein the additional income taxes attributable to their respective shares of the aforesaid compensation from Equitable, had such shares been included in their gross income ratably over the preceding period of ninety-four (94) months from August, 1935, to May, 1943, during which said services were rendered by said partnership. Such returns will be offered in evidence jointly by the parties as separate exhibits herein, and there is no controversy between the parties in these proceedings regarding the taxable net income, exemptions, credits and taxes previously paid for the years 1935 to 1943, inclusive, of

each petitioner as shown in the schedule attached to each of said 1944 returns. The respondent disallowed the petitioners' claims for the benefit of section 107(a) of the Internal Revenue Code for reasons set forth in the statements attached to the respective deficiency notices.

11. In auditing the income tax returns of the other partners of said partnership for the year 1944, respondent has allowed the application of section 107(a) of the Internal Revenue Code to the distributive share in said compensation received from Equitable in 1944 of each partner who claimed the benefits of Section 107(a) if he was a partner in said partnership for more than three years prior to December, 1944.

12. Following the filing of petitions in each of these proceedings on December 3, 1948, each petitioner, on December 8, 1948, executed a Waiver of Restrictions on Assessment and Collection of Deficiency in Tax on Treasury Department Form 870 for the calendar year 1944 in the amount of \$405.74 for petitioner Sigvald Nielson and in the amount of \$450.45 for petitioner Madge Nielson. Said waivers were filed with the Internal Revenue Agent in Charge, San Francisco, on December 9, 1948, together with a letter of transmittal, which stated, in part, as follows:

“In order to stop the running of interest on any liability that may be determined by the Tax Court in these proceedings the taxpayers wish to permit the assessment and collection of the

amounts of the deficiencies determined, but subject to the final determination of the Tax Court in said proceedings. Herewith for that purpose are forms 870 executed by said taxpayers.”

The deficiencies involved in these proceedings were duly assessed, and on March 17, 1949, Sigvald Nielson paid the amount of tax so assessed of \$405.74, together with interest in the sum of \$92.89, and Madge Nielson paid the amount of tax so assessed of \$450.45, together with interest in the sum of \$103.13, to the Collector of Internal Revenue at San Francisco, California.

Dated: November 3, 1949.

/s/ SIGVALD NIELSON,

/s/ HARRY R. HORROW,

/s/ JOSEPH L. SELIGMAN, JR.,

Counsel for Petitioners.

/s/ CHARLES OLIPHANT,

E.C.C.

Chief Counsel, Bureau of Internal Revenue, Counsel
for Respondent.

Filed T.C.U.S. November 7, 1949.

The Tax Court of the United States

Docket No. 21103, Docket No. 21104

SIGVALD NIELSON, MADGE NIELSON,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Monday, November 7, 1949.

Met, pursuant to notice, at 12:50 o'clock p.m.

Before: Hon. Marion J. Harron,
Judge.

Appearances:

HARRY R. HORROW,

225 Bush Street, San Francisco, California,
Appearing on behalf of the Petitioners.

EARL C. CROUTER,

(Hon. Charles Oliphant, Chief Counsel,
Bureau of Internal Revenue)

Appearing for the Respondent.

PROCEEDINGS

The Court: We will take up the Nielson cases first, Docket No. 21103 and -04.

Mr. Horrow: Harry R. Horrow, for Petitioners.

Mr. Cruter: Earl C. Cruter, for Respondent in both cases.

Mr. Horrow: If you Honor please, the issue in

both cases is identical. I would like at this time to file a joint motion for consolidation.

The Court: The motion is granted.

Opening Statement on Behalf of Petitioners
By Mr. Horrow:

The issue here arises under Section 107 of the Internal Revenue Code. It involves the year 1944. That section permits taxpayers to pay the taxes attributable to income which is covered by that section that would have been payable over the period during which the services giving rise to that income were performed, in lieu of the tax that would have been payable during the taxable year on that income in which it was received.

There is no dispute, your Honor, as to the fact that all of the conditions requisite to the application of Section 107 were complied with in this case, except in one respect; namely, that the Petitioner, Sigvald Nielson, was not a member of the law partnership for a period of more than 36 months. The income in question was a fee that was received by the partnership during the year 1944. The services which were rendered in the performance of that fee took place over a period of seven or eight years. The compensation was paid in a lump sum on conclusion of the performance of the services. There is no dispute as to the amount of income with respect to the fee to which the Petitioners here are chargeable. The Respondent, however, has disallowed the benefits of 107 to these Petitioners, solely on the ground that the Petitioner Sigvald Nielson, was not a member of the partnership for more than 36 months.

All of the facts, your Honor, are stipulated with the exception of two exhibits, which will be the returns of the Petitioners in these cases.

I would like to file at this time the stipulation of facts that the parties have entered into.

The Court: Are there any exhibits attached to the stipulation?

Mr. Horrow: There are none, your Honor. The only exhibits will be the returns that are entered in evidence as joint exhibits.

The Court: The stipulation and exhibits will be received and made a part of the record.

Mr. Horrow: I believe that states our case, your Honor.

The Court: How much of this fee was paid to Mr. Nielson. I understand, of course, that his wife is the Petitioner in the case only because the income was a community income?

Mr. Horrow: That is correct.

The Court: And the issue relates only to Mr. Nielson. Now, from what you say, it would appear that the firm in which Mr. Nielson was for part of the time at least an associate and not a member of the firm, received the fee?

Mr. Horrow: That is correct.

The Court: Mr. Nielson was counsel assigned to that particular case? Was he paid on an annual basis or was he paid on an annual basis plus bonus, and if he was paid by a bonus, did his bonus represent part of this fee? Can you trace this fee directly into the compensation to him?

Mr. Horrow: The stipulation, your Honor, cov-

ers the manner of compensation to Petitioner Sigvald Nielson during this entire period. The deficiency notice determines the portion of the fee which is taxable to each Petitioner.

The Court: What do you mean by "Each Petitioner?"

Mr. Horrow: The income in question is community income.

The Court: Well, could you conveniently translate that, turn that around, into just the amount of the income that its attributable to the services of Mr. Nielson? Let's forget about Mrs. Nielson. She had nothing to do with the matter.

Mr. Horrow: I will read from the deficiency notice: "As a member of the partnership, you have received \$2,504.16, as your share of the fee, of which your one half community share is \$1,252.08." A similar statement was made in the deficiency notice addressed to Mrs. Nielson, except, of course, she was not referred to as a member of the partnership.

The Court: Now, it is stipulated on Page 3 of this stipulation that in certain years in addition to a fixed salary Mr. Nielson received a certain percentage of the net profits of the law partnership by which he was employed. Now, this lump sum fee that was received from the Equitable Life Assurance Society, was that, that fee, was the total figure more than \$43,000?

Mr. Horrow: No. That was the only amount that was received by the company as its fee for the services rendered.

The Court: Just \$43,000?

Mr. Horrow: That is correct.

The Court: Did Mr. Nielson receive all of that?

Mr. Horrow: The amount that he received as a member of the partnership is in the deficiency notice and is stipulated to be \$2,504.16, of which one half was his community share.

The Court: Now, that amount was arrived at by taking one of these percentages, was it, Mr. Horrow?

Mr. Horrow: That is correct, your Honor.

The Court: He was entitled to a certain percentage of the partnership profits?

Mr. Horrow: That is correct.

The Court: And applying that percentage to the fee, that was the way that he received the part of the fee? Now, what is the point, Mr. Horrow, that seems to be the only point in the case in your mind? The Respondent takes the view that Mr. Nielson became a member of the partnership, was a member of the partnership, for only a certain period of time. As I understand the statute, any taxpayer who receives compensation in one year for services that extend over several years in the past is entitled to allocate, so to speak, part of that compensation to the other years. Now, that would be true whether Mr. Nielson was a member of the partnership or wasn't, isn't that correct?

Mr. Horrow: That is our understanding.

The Court: What is the point here about? You say the only reason that this was done was because Mr. Nielson was not a member of the partnership the whole time. Is that really your understanding of it?

Mr. Horrow: That is my understanding of it. I would prefer that counsel for the Respondent state the Respondent's position in the matter. That is my understanding of it.

The Court: The reason I just asked you these questions about the facts is that it would seem to be proper for a taxpayer to allocate over several years the amount of compensation which he received in one year for services which extended over past years. This is just a matter of principal, I take it, because the amount of the fee allocated to Mr. Nielson is about \$2,000?

Mr. Horrow: That is correct, your Honor.

The Court: And the question is whether that \$2,000 is to be included income in one year or prorated over earlier years, is that right?

Mr. Horrow: That is right. This is really a test case of this point. It is involved in subsequent years with respect to other fees for other partners and we are in entire agreement with your Honor's position. We are at a loss to find any provision of the statute which justifies the Respondent's position in this case.

Opening Statement on Behalf of Respondent
By Mr. Crouter:

If your Honor please, I believe the general factual situation in both of these proceedings has been quite accurately stated as presented by Mr. Horrow and the situation as brought out by your Honor's questions and discussion.

I would like to call the Court's attention to the statement contained in the paragraph on the second

page attached to the deficiency notice, down about the third paragraph, sort of bringing this question to a head. The statement says among other things the following: "It is held that prior to May 1, 1942, the income received by you was that of an employee of the partnership; and prior to that date you did not have the right to participate in the fees received by the partnership from the Equitable Life Assurance Company."

The Court: Emphasis there on the point "right to receive"?

Mr. Crouter: Yes, the right, and the status as an employee in the partnership firm.

The Court: I wonder if I may ask you a question right here. Possibly it would show it in this. Mr. Nielson, as I understand it, became a member of this firm in one of these taxable years, did he?

Mr. Crouter: It is stipulated.

The Court: In what year?

Mr. Crouter: Page 3.

The Court: That is all right.

Mr. Crouter: May 1, 19——

The Court: Just answer my question. When did he become a member of this firm?

Mr. Crouter: May 1, 1943, and the taxable year is 1944. The statute requires three years or more of an earning period, and under the regulations and rulings, GCM-25795, continued in the 1948 Cumulative Bulletins, 1948-2, Page 61. The rulings have covered situations rather close to this and it is Respondent's position that the case of these Petitioners is not within either the statute or the regulations in

allowing, if I may refer to it as such, a tacking on of the period when the individual or taxpayer was a mere employee and had an employee's status, to tack that on to the period when the individual admittedly became a member of the partnership.

Now, I think, your Honor——

The Court: Your point is then, Mr. Crouter, that the taxpayer had no right to participate in any fees?

Mr. Crouter: That is correct.

The Court: Prior to the time that he became a member of the firm, is that right?

Mr. Crouter: Yes.

The Court: He might have worked on this matter but he would just be paid a salary? He wouldn't get any part of the fee paid by the Equitable Life Assurance Society as such, is that what you mean?

Mr. Crouter: That is correct, and in our stipulated facts we will show to the Court that the taxpayer was compensated under the salary arrangement and a participation in net profits of the partnership right up to the period when he became a partner, May 1, 1942, so that the only period of the earning of the partnership of this fee when the Petitioner Sigvald Nielson was a member, is less than three years, and if the Court should hold that that is a fact as stipulated and that it requires a period of three years or more, then Petitioners admittedly are not under the statute.

Now, this case, I believe, these pair of cases, do raise the question in a rather striking manner, in

that the returns and the facts show that the Petitioners would relate this \$2500.00 way back, part of it to 1935 back to years much before the year 1942 when the Petitioners became, or the Petitioner Sigvald Nielson became, a member of the partnership. I do not want to argue the case but I do believe that the fact as to the employment status both as to a mere employee, as an employee plus a participation in earnings, are fully covered in our stipulated facts and they also show the admitted facts as to what he earned and did and received during the latter period when a partner. But the Respondent contends that is not sufficient. I believe that on an analysis of similar cases, that the facts will show here that the taxpayers in the position of these petitioners were never within the contemplation of Congress intended to give relief under Section 107 of the Internal Revenue Code.

If that is enough from the standpoint of the Court's questions, I would just like to submit as an exhibit in the case the 1944—this is the photostat of the 1944 return of Sigvald Nielson.

The Court: That is received as Respondent's Exhibit A.

Mr. Crouter: Could we make it a joint 1-A?

The Court: It is not necessary. Exhibit A.

(Whereupon the document was marked for identification as Exhibit A and was received in evidence.)

RESPONDENT'S EXHIBIT A

FILED

none

File this return with Collector of Internal Revenue on or before March 15, 1945. Any balance of tax due (item 8, below) must be paid in full with return. See separate instructions for filling out return.

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1944

194

FORM 1040
Treasury Department
Internal Revenue Service

— CRED —
FILE NO. 20120
CH. NO. 490132
1st DIST. OF CALIFORNIA

NAME SIGVALD NIELSON
(PLEASE PRINT. If this return is for a husband and wife, use both first names.)
ADDRESS 225 Bush Street
(PLEASE PRINT. Street and number or rural route.)
San Francisco 4 California Social Security No. (if any) 14

(City or town, postal zone number) (State)

Do not write in these spaces
File Code 7138
Serial No. 90832
District 1 Calif
(Cashier's Stamp)
RECEIVED
94 MAR 15 1945
COLL. INT. REV.
1st DIST. CAL.

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives with 1944 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

NAME (Please print)	Relationship	NAME (Please print)	Relationship
YOUR name Sigvald Nielson			
Samuel Nielson	Father		
Marie Nielson	Mother		

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1944, BEFORE PAY-ROLL DEDUCTIONS for taxes, insurance, bonds, etc. Member of Armed Forces and persons claiming traveling or reimbursed expense, see instruction 2.

PRINT EMPLOYER'S NAME	WHERE EMPLOYED (CITY AND STATE)	AMOUNT
	ASSESSMENT	
	Tax	
	Penalty	
	Interest	

3. Enter here the total amount of your dividends and interest (including interest from Government obligations unless wholly exempt from taxation) 58 8

4. If you received any other income, give details on page 3 and enter the total here 11,688 7

5. Add amounts in items 2, 3, and 4, and enter the total here \$ 11,748 5

IF YOUR INCOME WAS LESS THAN \$5,000. — If you are a married man, enter the tax on page 2. This table, which is provided by law, is based on the same tax rates as are used in the Tax Computation Table. The table automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these kinds amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 4.

IF YOUR INCOME WAS \$5,000 OR MORE. — Disregard the tax table and compute your tax on page 4. You may either take a standard deduction of \$500 or itemize your deductions, whichever is to your advantage. 519862

HUSBAND AND WIFE. — If husband and wife file separate returns, each must take his own deductions; the other must also itemize deductions.

6. Enter your tax from table on page 2, or from line 15, page 4 2,875.86 197.44 * \$ 2,973 36

7. How much have you paid on your 1944 income tax?
(A) By withholding from your wages (Attach Withholding Receipts, Form W-2). \$ 3,175
(B) By payments on 1944 Declaration of Estimated Tax. 3,175

8. If your tax (item 6) is larger than payments (item 7), enter BALANCE OF TAX DUE here \$ 201 7

9. If your payments (item 7) are larger than your tax (item 6), enter the OVERPAYMENT here \$
Check (✓) whether you want this overpayment: Refunded to you ☐ or Credited on your 1945 estimated tax ☒

If you filed a return for a prior year, what was the latest year? 1943
To which Collector's office was it sent? San Francisco
To which Collector's office did you pay amount claimed in item 7 (B), above? San Francisco
In your wife (or husband) making a separate return for 1944? Yes
If "Yes," write below: Name of wife (or husband) Madge Nielson
Collector's office to which sent San Francisco

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.
(Signature of person (other than taxpayer or agent) preparing return) Date 1/13/45 (Signature of taxpayer) Date

(Please fill in if self-employed, if any) (If this is a joint return of husband and wife, it must be signed by both)

Do not use this page if your income is wholly from salaries, wages, dividends, and interest

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in)	\$	4. Total amount received this year	\$
2. Amount received tax-free in prior years		5. Excess, if any, of line 4 over line 3	
3. Remainder of your cost (line 1 less line 2)	\$	6. Enter line 5, or 3 percent of line 1, whichever is greater	\$

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (explain in Schedule G)
	\$	\$	\$	\$
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)	\$	\$	\$	\$

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1041F)

(State (1) nature of business ; (2) business name)

1. Total receipts	\$		
COST OF GOODS SOLD (To be used where inventories are an income-determining factor) (Enter the letters "C," or "C or M," on line 2 and 3 if inventories are valued at either cost, or cost or market whichever is lower)		OTHER BUSINESS DEDUCTIONS	
2. Inventory at beginning of year	\$	11. Salaries and wages not included as "Labor"	\$
3. Merchandise bought for sale	\$	12. Interest on business indebtedness	
		13. Taxes on business and business property	
		14. Losses (explain in Schedule G)	
		15. Bad debts arising from sales or services	
		16. Depreciation, obsolescence and depletion	

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

Name and Address of partnership, etc.: Amount, \$11,950.03
PILLSBURY, MADISON & SUTRO,
225 Bush Street,
San Francisco 4

Business expenses:

Bar Association dues \$ 14.
Entertainment and miscellaneous 249.29 263.29
\$11,686.74

Total

Total income from above sources (Enter as item 4, page 1)

\$11,686.74

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (Do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulating depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
		\$	\$	\$	\$			\$

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

1. Column or Line No.	2. Explanation	3. Amount	1. Column or Line No.	2. Explanation	3. Amount
		\$			\$

Do not itemize deductions if—(1) You determine your tax from the tax table on page 2, or
 (2) Your total income is \$5,000 or more and you claim the \$500 standard deduction.
 If husband and wife living together at end of year file separate returns and one itemizes deductions, the other must file his or her return on Form 1040, and must also itemize deductions.

DEDUCTIONS

Describe deductions and state to whom paid. If more space is needed, list deductions on separate sheet of paper and attach to this return.

Amount

Contributions

Allowable Contributions (not in excess of 15 percent of item 5, page 1)

Interest

Total Interest

Taxes

Total Taxes

Losses from fire, storm, shipwreck, or other casualty, or theft

Total Allowable Losses (not compensated by insurance or otherwise)

Medical and dental expenses

Net Expenses (not compensated by insurance or otherwise)

Enter 3 percent of item 5, page 1, and subtract from Net Expenses

Allowable Medical and Dental Expenses. See Instruction for limitation.

Miscellaneous (including alimony, amortizable bond premium, special deduction for the blind, etc.)

Total Miscellaneous Deductions

TOTAL DEDUCTIONS

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 2

1. Enter amount shown in item 5, page 1. This is your Adjusted Gross Income.	11,745	58
2. Enter DEDUCTIONS (If deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is \$5,000 or more and deductions are not itemized, enter the standard deduction of \$500).	500	
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income.	11,245	58
4. Enter your Surtax Exemptions (\$500 for each person listed in item 1, page 1).	1,500	
5. Subtract line 4 from line 3. Enter the difference here. This is your Surtax Net Income.	9,745	58
6. Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 5. Enter the amount here.	2,553	50
7. Copy the figure you entered on line 3, above. (If line 3 includes partially tax-exempt interest, see Tax Computation Instructions).	11,245	58
8. Enter your Normal-Tax Exemption (\$500 if return includes income of only one person; otherwise see Tax Computation Instructions).	500	
9. Subtract line 8 from line 7, and enter the difference here.	10,745	58
10. Enter here 3 percent of line 9. This is your Normal Tax.	322	36
11. Add the figures on lines 6 and 10, and enter the total here. (If alternative tax computation is made on separate Schedule D, enter here tax from line 15 of Schedule D).	2,875	86
If you used the \$500 standard deduction in line 2, disregard lines 12, 13, & 14, and copy on line 15 the same figure you entered on line 11		
12. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116).		
13. Enter here any income tax paid at source on tax-free covenant bond interest.		
14. Add the figures on lines 12 and 13 and enter the total here.		
15. Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax.		

Form 872

Duplicate

Consent Fixing Period of Limitation Upon
Assessment of Income and Profits Tax

....., 19....

In pursuance of the provisions of existing Internal Revenue Laws Sigvald Nielson, a taxpayer (or taxpayers) of 225 Bush Street, San Francisco, California, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year ended December 31, 1944, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1949, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

/s/ SIGVALD NIELSON,
Taxpayer.¹

[Seal²] /s/ GEO. J. SCHOENEMAN,
Commissioner of Internal
Revenue.

By /s/ R. L. S.

Date: 12/24/47.

¹This consent may be executed by the taxpayer's attorney or agent, provided such action is specifically

Power of Attorney

Know All Men by These Presents:

That Sigvald Nielson of San Francisco, California, does by these presents hereby make, constitute and appoint Harry R. Horrow, Douglas Erskine and Murray Gartner, of the firm of Pillsbury, Madison & Sutro, San Francisco, California, and each of them, his true and lawful attorneys, to appear for him and represent him before the Treasury Department in connection with his federal income taxes for the year 1944 with full power of substitution and revocation; giving his said attorneys, and each of them, full power to do everything whatsoever requisite and necessary to be done in the premises, and to receive refund checks, execute waivers of the

authorized by a power of attorney, which, if not previously filed, must accompany the consent.

If executed with respect to a year for which a Joint Return of a Husband and Wife was filed, this consent must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

²If this consent is executed on behalf of a corporation, it shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which the seal of the corporation must be affixed. Where the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the board of directors, giving the officer authority to sign the consent.

statute of limitations, and execute closing agreements, as fully as the undersigned might do if done in his own capacity, at any time subsequent to the date hereof and prior to the revocation hereof.

All powers of attorney for this purpose heretofore filed or executed by the undersigned are hereby revoked.

In Witness Whereof, the undersigned has caused this instrument to be executed and signed by his own hand this 30th day of April, 1948.

/s/ SIGVALD NIELSON.

[Stamped]: Received May 3, 1948. Internal Revenue Agent in Charge, San Francisco.

State of California,

City and County of San Francisco—ss.

On this 30th day of April, 1948, before me, Chalmer Munday, a notary public in and for said city and county and state, residing therein, duly commissioned and sworn, personally appeared Sigvald Nielson, known to me to be the person who executed the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the city

and county and state aforesaid the day and year in this certificate first above written.

/s/ CHALMER MUNDAY,
Notary Public in and for the City and County of
San Francisco, State of California.

[Stamped]: Received May 3, 1948. Internal
Revenue Agent in Charge, San Francisco.

San Francisco, California.

April 30th, 1948.

This is to certify that we have not entered into a contingent or partially contingent fee agreement for the representation before the Treasury Department of Sigvald Nielson in connection with his federal income taxes for the year 1944 under the terms of the power of attorney attached hereto.

/s/ HARRY R. HORROW,

/s/ DOUGLAS ERSKINE,

/s/ MURRAY GARTNER.

[Stamped]: Received May 3, 1948. Internal
Revenue Agent in Charge, San Francisco.

Addendum to Federal Income Tax Return for Sigvald Nielson and
Madge Nielson Relating to Income Subject to Section 107(a)
of the Internal Revenue Code

In December, 1944, the firm of Pillsbury, Madison & Sutro received payment of the sum of \$43,425 as compensation for personal services covering a period of more than 36 months from the beginning to the completion of such services, such sum being in excess of 80 per cent of the total compensation for such personal services. The share of the taxpayer, Sigvald Nielson, and his wife, Madge Nielson, amounted to \$2,504.16, which is divided equally between them as community property and distributed ratably over the period during which the services were rendered, namely,

August 4, 1935, to and including May of 1943, and results in a tax of

\$97.44 to S. Nielson

\$62.51 to Madge Nielson

in addition to that shown on the return herewith dealing with income returnable in 1944.

Details of computation:

Year	Joint Return	S. Nielson	Madge Nielson
1935.....	\$.74		
1936.....	---		
1937.....	11.50		
1938.....	11.50		
1939.....	11.50		
1940.....	---	\$ 6.34	\$ 6.34
1941.....	---	20.14	20.14
1942-1943.....	---	35.72	36.03

1935 Joint Return

Prior reported income	\$3,998.34
Additional—Sec. 107(a) I.R.C.	133.20
Revised income	4,131.54
Exemptions and credits	4,113.15
Balance subject to normal tax	18.39
4% normal tax74
Tax previously paid	---
Tax now payable	\$.74

1936 Joint Return

Prior reported income	\$3,525.13
Additional—Sec. 107(a) I.R.C.	319.68
Revised income	3,844.81
Exemptions and credits	4,052.50
Subject to normal tax	---

1937 Joint Return

Prior reported income	\$4,761.14
Additional—Sec. 107(a) I.R.C.	319.68
Revised income	5,080.82
Exemptions and credits	4,208.08
Balance subject to normal tax	872.74
4% normal tax	34.90
Tax previously paid	23.40
Tax now payable	\$ 11.50

1938 Joint Return

Previously reported income	\$5,261.23
Additional—Sec. 107(a) I.R.C.	319.68
Revised income	5,580.91
Exemptions and credits	4,258.09
Balance subject to normal tax	1,322.82
4% normal tax	52.91
Tax previously paid	41.40
Tax now payable	\$ 11.51

1939 Joint Return

Previously reported income	\$6,693.05
Additional—Sec. 107(a) I.R.C.	319.68
Revised income	7,012.73
Exemptions and credits	4,401.27
Balance subject to normal tax	2,611.46
4% normal tax	104.45
Tax previously paid	92.95
Tax now payable	\$ 11.50

1940 Return

	Sigvald Nielson	Madge Nielson
Previously reported income	\$3,701.42	\$3,701.42
Additional—Sec. 107(a) I.R.C.	159.84	159.84
Revised income	3,861.26	3,861.26
Exemptions and credits	1,986.12	1,986.12
Balance subject to normal tax	1,875.14	1,875.14
4% normal tax	75.00	75.00
Defense tax	7.50	7.50
Revised total taxes	82.50	82.50
Tax previously paid	76.16	76.16
Tax now payable	\$ 6.34	\$ 6.34

1941 Return

	Sigvald Nielson	Madge Nielson
Previously reported income	\$4,084.83	04,084.83
Additional—Sec. 107(a) I.R.C.	159.84	159.84
Revised income	4,244.67	4,244.67
Exemptions and credits	1,774.46	1,774.46
Balance subject to normal tax	2,470.21	2,470.21
4% normal tax	98.80	98.80
Tax previously paid	93.05	93.05
Additional normal tax	5.75	5.75
Revised surtax net income	2,894.67	2,894.67
Surtax	200.52	200.52
Paid	186.13	186.13
Balance due on surtax	14.39	14.39
Total balance due	\$ 20.14	\$ 20.14

1942 Return

Previously reported income	\$7,349.25	\$7,349.25
Additional—Sec. 107(a) I.R.C.	159.84	159.84
Revised income	7,509.09	7,509.09
Exemptions and credits	1,125.00	1,125.00
Surtax net income	6,384.09	6,384.09
Earned income credit	750.91	750.91
Normal tax net	5,633.18	5,633.18
Normal 6% tax	337.99	337.99
Surtax	1,072.18	1,072.18
Total revised tax	\$1,410.17	\$1,410.17

1943 Return

	Sigvald Nielson	Madge Nielson
Previously reported	\$10,205.13	\$10,205.13
Additional—Sec. 107 (a) I.R.C.	66.60	66.60
Revised income	10,271.73	10,271.73
Personal exemption	1,125.00	1,125.00
Surtax net income	9,146.73	9,146.73
Earned income credit	1,027.17	1,027.17
Normal tax net	8,118.56	8,118.56
Surtax: 8,000.00	1,460.00	1,460.00
1,146.73 28%	321.08	321.08
Normal 6% tax	1,781.08	1,781.08
487.11	487.11	487.11
10—Total income tax	2,268.19	2,268.19
Net victory tax	271.41	301.57
16—	2,539.60	2,569.76
17—1942 tax	1,410.17	1,410.17
18—Larger	2,539.60	2,569.76
19—Smaller 1,410.17		
75% 1,057.63		
Unforgiven	352.54	352.54
20—	2,892.14	2,922.30
21—Total payments	2,204.28	2,204.28
Unpaid balance	687.86	718.02
Paid 3/14/44	481.75	511.60
Paid 3/14/45	170.39	170.39
Balance due	\$ 35.72	\$ 36.03
1943 Victory Tax		
Victory Tax net	\$10,609.87	\$10,609.87
Additional income	66.60	66.60
Specific exemption	10,676.47	10,676.47
624.00	624.00	624.00
Victory Tax 5%	10,052.47	10,052.47
502.62	502.62	502.62
Victory Tax credit 46%	231.21	201.05
	\$ 271.41	\$ 301.57

Admitted November 7, 1949.

Mr. Crouter: And the next return, the 1944 return of Madge Nielson, as Exhibit B.

The Court: Received in evidence as Exhibit B.

(Whereupon the document was marked for identification as Exhibit B and was received in evidence.)

Mr. Crouter: Respondent rests.

The Court: Is there anything further?

Mr. Horrow: Nothing further.

The Court: The original brief will be due December 22nd, 1949, and the reply briefs on January 16, 1950, and the case now stands submitted.

Mr. Horrow: Thank you very much.

Mr. Crouter: I want to thank your Honor for letting me present these cases this morning. I appreciate it very much.

The Court: We will convene at 2:30, to give the Reporter and all of us plenty of time for lunch.

(Whereupon, at 1:10 o'clock p.m., the hearing in the above-entitled matter was concluded.)

Certificate

I, Franklin R. Greene, one of the official reporters of The Tax Court of the United States under its reporting contract, assigned to report certain proceedings during the session of The Tax Court in San Francisco, California, beginning November 7, 1949, do hereby Certify as follows:

That I reported all of the proceedings in the case of Sigvald Nielson, Docket No. 21103, and Madge

Nielson, Docket 21104, Petitioners, on November 7, 1949, before the Honorable Marion J. Harron, Judge of The Tax Court;

That I did well and truly, to the best of my ability, record in Stenotypy fully, completely and accurately all of the proceeding which I was assigned to report, including all colloquy and statements made during the proceedings, and all questions to and answers given by witnesses;

That my stenotype record is full, complete and accurate; and

That the foregoing record is a true, complete and accurate transcript of my stenotype notes of all the proceedings which I reported, and all of the testimony which was taken in the above-entitled cause.

/s/ FRANKLIN R. GREENE,
Reporter.

Date: Nov. 23, 1949.

Filed T.C.U.S. December 7, 1949.

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT AND OPINION

Harron, Judge:

The Commissioner has determined a deficiency in income tax for the year 1944 in the amount of \$405.74, in Docket No. 21103; and of \$450.45, in Docket No. 21104. These proceedings have been consolidated for trial and opinion.

The only issue is whether the petitioner, Sigvald Nielson, as a member of a law partnership, is entitled to apply Section 107, Internal Revenue Code, so as to include in the time of the rendition of the services the period prior to his admission to a partnership. The respondent has held that the petitioner is not entitled to receive the benefit of section 107, as amended, because he had not been a member of a partnership for 36 months.

Findings of Fact

The facts have been stipulated. The facts as stipulated are found as facts. The facts necessary for an understanding of the question are as follows:

The petitioners are husband and wife, who have resided in California since their marriage in 1924, to and including the taxable year, 1944. Each petitioner filed a separate return for 1944 with the collector for the first district of California. The returns were made on the cash basis.

Sigvald Nielson, referred to hereinafter as the "petitioner," is a lawyer. He became associated with a law partnership in San Francisco in November, 1935, as an employee of the firm; and ever since that time, he has been associated with the same firm.

On May 1, 1942, the petitioner was admitted into the partnership, and he became entitled to receive, thereafter, a distributive share, each year, of the net profits of the partnership.

From the date of his employment by the firm to January 1, 1939, the petitioner received a fixed salary as compensation for his services. Thereafter, until May 1, 1942, he received during each calendar

year, in addition to a fixed salary, a fixed percentage of the net profits of the partnership, as follows: 0.463 per cent, in 1939; 0.526 per cent, in 1940; 0.631 per cent, in 1941; and 0.631 per cent, from January 1 to April 30, 1942.

After May 1, 1942, when the petitioner became a member of the partnership, the distributive shares of the net profits thereof to which he was entitled, and which he received, were as follows: 2.314 per cent, from May 1 to December 31, 1942; 4.573 per cent, 1943; 3.5 per cent, from January 1 to April 30, 1944; and 5.766 per cent, from May 1 to December 31, 1944.

From August 4, 1935, up to and including May, 1943, a period of ninety-four (94) months, said partnership rendered legal services to The Equitable Life Assurance Society of the United States, hereinafter referred to as "Equitable," in connection with litigation growing out of the imposition by the State of California of a tax on gross premiums from insurance and annuities. These services were entirely distinct and separate from other legal services then being rendered to Equitable by said partnership and after the completion of these special services, said partnership received from Equitable \$43,425 as compensation for said services. Said compensation was received in a lump sum in December, 1944, and no other compensation was ever received by said partnership from Equitable for said services.

For many years past and during all of the years material herein, all fees received for legal services

by said partnership have been pooled in a single fund, which has been first used to pay all expenses. The balance, representing the net profits of the partnership, has been distributed periodically among all of the partners and all of the employees entitled to share therein. The amount of such distributions has been computed on the basis of a quarterly allocation to the profit-sharing employees and a calendar year allocation to the partners of the profits of the partnership, all in accordance with the percentage shares agreed upon by the partners and in effect during the period in which the net profits were received. Each partner and profit-sharing employee has shared in such division of all profits received during any period in which he has been entitled to a share of the partnership profits according to such agreement of the partners; conversely, when a partner or employee has ceased to be such by death or retirement or otherwise, he has not shared in any profit or profits received after the month in which the cessation has occurred.

At all times material herein, said partnership kept its books of account and filed its income tax returns on a calendar year and cash receipts and disbursements basis.

Sigvald Nielson's distributive share of said partnership's net income for the year 1944 included his distributive share in said Equitable fee in the amount of \$2,504.16. One-half of said distributive share, or \$1,252.08, was the community income of Sigvald Nielson and the other one-half was the community income of his wife, Madge Nielson.

In their Federal income tax returns for 1944 petitioners each claimed the benefits of section 107(a) of the Internal Revenue Code and reported therein the additional income taxes attributable to their respective shares of the aforesaid compensation from Equitable, had such shares been included in their gross income ratably over the preceding period of ninety-four (94) months from August, 1935, to May, 1943, during which said services were rendered by said partnership.

The respondent disallowed the petitioners' claims for the benefit of section 107(a) of the Internal Revenue Code because Sigvald Nielson has not been a member of the partnership for a period of 36 months. Respondent held that, therefore, he did not qualify for relief under the provisions of section 107(a).

Following the filing of petitions in each of these proceedings on December 3, 1948, each petitioner, on December 8, 1948, executed a Waiver of Restrictions on Assessment and Collection of Deficiency in Tax on Treasury Department Form 870 for the calendar year 1944 in the amount of \$405.74 for petitioner, Sigvald Nielson, and in the amount of \$450.45 for petitioner, Madge Nielson. Said waivers were filed with the Internal Revenue Agent in Charge, San Francisco, on December 9, 1948, together with a letter of transmittal, which stated, in part, as follows.

In order to stop the running of interest on any liability that may be determined by the Tax Court in these proceedings the taxpayers

wish to permit the assessment and collection of the amounts of the deficiencies determined, but subject to the final determination of the Tax Court in said proceedings. Herewith for that purpose are forms 870 executed by said taxpayers.

The deficiencies involved in these proceedings were duly assessed, and on March 17, 1949, Sigvald Nielson paid the amount of tax so assessed of \$405.74, together with interest in the sum of \$92.89, and Madge Nielson paid the amount of tax so assessed of \$450.45, together with interest in the sum of \$103.13, to the Collector of Internal Revenue at San Francisco, California.

Opinion

There is no dispute between the parties as to the fact that all of the conditions requisite to the application of section 107, Internal Revenue Code, as it applies to the year 1944, were complied with in these proceedings excepting in one respect, only: The petitioner was not a member of a partnership for the entire period of 36 months. The income in question was a fee that was received by the partnership in 1944. The services for which the fee was paid were rendered over a period of seven or eight years. The compensation for the services was paid in 1944 in a lump sum upon the conclusion of the services. There is no dispute as to the amount of the portion of the fee upon which the petitioners are taxable.

The question turns upon interpretation of section 107, as amended in 1942, and as it applies to the

year 1944. The question is whether section 107 contemplates allocation of compensation for personal services rendered by a partnership over the entire period of rendition of the services, notwithstanding that the taxpayer-partner who shares in the compensation was not a member of the partnership during all of that period.

The same question was presented to this Court for decision in the proceeding of Elder W. Marshall, et al, Docket Nos. 23432 and 23433. The opinion of this Court in those proceedings was promulgated on January 27, 1950. See 14 T.C. No. 12. The respondent made the same determination and argument in Elder W. Marshall, *supra*, as he has made in these proceedings.

In Elder W. Marshall, *supra*, this Court rejected the same contentions which the respondent has advanced here. Our holding in the Marshall case determines the question in these proceedings. It is unnecessary to restate here what we said in the Opinion in the Marshall case. It is held, therefore, that the respondent's determination in these proceedings is erroneous, as we said in Elder W. Marshall, *supra*:

Since it is the status of the recipient of the income in the year of receipt, and not either his status in prior years, Federico Stallforth, 6 T.C. 140, nor the identity of the individual who contributed the services, that is made to govern the application of section 107 in its present form, we are satisfied that under the facts of this proceeding petitioner correctly computed

his tax by use of its provisions.

Decisions will be entered that there are no deficiencies.

Received T.C.U.S. January 19, 1950.

[Seal]: Entered January 26, 1950.

The Tax Court of the United States
Washington

Docket No. 21103

SIGVALD NIELSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered on January 26, 1950, it is

Ordered and Decided: That there is no deficiency in income tax, and that there is overpayment of tax for the year 1944 in the amount of \$405.74, together with interest in the sum of \$92.89, which amounts were paid after the mailing of the notice of deficiency. (Section 322(d), Internal Revenue Code.)

[Seal]: /s/ MARION J. HARRON,
 Judge.

Entered: Jan. 27, 1950.

Served Jan. 27, 1950.

The Tax Court of the United States
Washington

Docket No. 21104

MADGE NIELSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered on January 26, 1950, it is

Ordered and Decided: That there is no deficiency in income tax, and that there is overpayment of tax for the year 1944 in the amount of \$450.45, together with interest in the sum of \$103.13, which amounts were paid after the mailing of the notice of deficiency. (Section 322(d), Internal Revenue Code.)

/s/ MARION J. HARRON,
Judge.

Entered January 27, 1950.

Served January 27, 1950.

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 21103

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

SIGVALD NIELSON,

Respondent on Review.

PETITION FOR REVIEW

To the Honorable Judges of the United States Court
of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on January 27, 1950 "That there is no deficiency in income tax and that there is overpayment of tax for the year 1944 in the amount of \$405.74" in respect of the Federal income tax liability of Sigvald Nielson, the above-named respondent on review. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The respondent on review, Sigvald Nielson, is a resident of Palo Alto, California, having a place of business at 225 Bush Street, San Francisco, California, and filed his Federal income tax return for the calendar year 1944, the taxable year here involved, with the Collector of Internal Revenue for

the First District of California whose office is located in San Francisco, California, and within the judicial circuit of the United States Court of Appeals for the Ninth Circuit.

Nature of Controversy

The issue which was presented to the Tax Court for its consideration and which was decided by that Court contrary to the Commissioner's determination is whether the taxpayer, Sigvald Nielson, is entitled to the benefits of Section 107(a) of the Internal Revenue Code relating to the taxability of compensation received for personal services covering a period of 36 calendar months or more where such compensation is received or accrued in one taxable year. The taxpayer, Sigvald Nielson, is a lawyer. He became associated with a law partnership in San Francisco in November, 1935, as an employee of the firm and has been associated with such firm since that time. The taxpayer received a fixed salary as compensation for his services from the date of his employment until January 1, 1939, and thereafter, until May 1, 1942, he received during each calendar year, in addition to his salary, a fixed percentage of the net profits of the partnership. The taxpayer was admitted into the partnership as a partner on May 1, 1942, and then became entitled to receive distributive shares of the net profits of the partnership. During December of the taxable year 1944 the partnership received in a lump sum compensation for legal services which it had rendered to The Equitable Life Assurance Society of the United States in connection with litigation

growing out of the imposition by the State of California of a tax on gross premiums from insurance and annuities. The services so rendered had occurred over a period of 94 months from August 4, 1935, to and including May, 1943. In reporting in his Federal income tax return for the year 1944 his one-half community share of his distributive portion of the partnership profits, the taxpayer claimed as to that portion of such distributive share which reflected his distributive portion in the fee received from The Equitable Life Assurance Society of the United States, to wit \$2,504.16, the benefits of Section 107(a) of the Internal Revenue Code; that is to say, he reported in his return only the additional income taxes attributable to the community half of his share of the Equitable compensation had such share been included in his gross income ratably over the preceding period of 94 months from August, 1935, to May, 1943, during which the services were rendered by the partnership. The Commissioner held that the taxpayer did not qualify for relief under the provisions of Section 107(a), for the reason that he had not been a member of the partnership for a period of 36 months when the compensation was received, and disallowed the claim for the benefit of that section. The Tax Court disagreed with the Commissioner's determination and allowed the taxpayer to compute his Federal income tax liability for the year 1944, in so far as his community share of the distributive portion in said Equitable fee is

concerned, by the application of Section 107(a) of the Internal Revenue Code.

/s/ THERON L. CAUDLE,
Assistant Attorney General.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Attor-
neys for Petitioner on Review.

Received and Filed T.C.U.S., April 21, 1950.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING OF PETITION
FOR REVIEW

To: Mr. Sigvald Nielson,
1620 Cowper Street,
Palo Alto, California.
Business Address:
225 Bush Street, San Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of April, 1950, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 21st day of April, 1950.

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of Internal Revenue, Counsel for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 24th day of April, 1950.

/s/ SIGVALD NIELSON,

Respondent on Review.

Received and Filed T.C.U.S., May 5, 1950.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Harry R. Horrow, Esquire, 225 Bush Street,
San Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of April, 1950, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 21st day of April, 1950.

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of Internal Revenue, Counsel for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 24th day of April, 1950.

/s/ HARRY R. HORROW,
Counsel for Respondent on
Review.

Received and Filed, T.C.U.S., May 5, 1950.

[Title of Court of Appeals and Cause.]

PETITION FOR REVIEW

To the Honorable Judges of the United States Court
of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on January 27, 1950, "That there is no deficiency in income tax and that there is overpayment of tax for the year 1944 in the amount of \$450.45" in respect of the Federal income tax liability of Madge Nielson, the above-named respondent on review. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The respondent on review, Madge Nielson, is a resident of Palo Alto, California, and filed her Federal income tax return for the calendar year 1944, the taxable year here involved, with the Collector of Internal Revenue for the First District of California whose office is located in San Fran-

cisco, California, and within the judicial circuit of the United States Court of Appeals for the Ninth Circuit.

Nature of Controversy

The issue which was presented to the Tax Court for its consideration and which was decided by that Court contrary to the Commissioner's determination is whether the taxpayer, Madge Nielson, and her husband, Sigvald Nielson, are entitled to the benefits of Section 107(a) of the Internal Revenue Code relating to the taxability of compensation received for personal services covering a period of 36 calendar months or more where such compensation is received or accrued in one taxable year. The taxpayer's husband, Sigvald Nielson, is a lawyer. He became associated with a law partnership in San Francisco in November, 1935, as an employee of the firm and has been associated with such firm since that time. The taxpayer's husband received a fixed salary as compensation for his services from the date of his employment until January 1, 1939, and thereafter, until May 1, 1942, he received during each calendar year, in addition to his salary, a fixed percentage of the net profits of the partnership. The taxpayer's husband was admitted into the partnership as a partner on May 1, 1942, and then became entitled to receive distributive shares of the net profits of the partnership. During December of the taxable year 1944 the partnership received in a lump sum compensation for legal services which it had rendered to The Equitable Life As-

insurance Society of the United States in connection with litigation growing out of the imposition by the State of California of a tax on gross premiums from insurance and annuities. The services so rendered had occurred over a period of 94 months from August 4, 1935, to and including May, 1943. In reporting in their separate Federal income tax returns for the year 1944 their respective one-half community shares of his distributive portion of the partnership profits, the taxpayer and her husband claimed as to that portion of such distributive share which reflected his distributive portion in the fee received from The Equitable Life Assurance Society of the United States, to wit \$2,504.16, the benefits of Section 107(a) of the Internal Revenue Code; that is to say, the taxpayer and her husband each reported in his or her return only the additional income taxes attributable to the respective community halves of his share of the Equitable compensation had such share been included in their gross incomes ratably over the preceding period of 94 months from August, 1935, to May, 1943, during which the services were rendered by the partnership. The Commissioner held that the taxpayer's husband did not qualify for relief under the provisions of Section 107(a), for the reason that he had not been a member of the partnership for a period of 36 months when the compensation was received, and disallowed the claim for the benefit of that section. The Tax Court disagreed with the Commission's determination and allowed the tax-

payer and her husband to compute their respective Federal income tax liabilities for the year 1944, in so far as his share of the distributive portion in said Equitable fee is concerned, by the application of Section 107(a) of the Internal Revenue Code.

/s/ THERON L. CAUDLE,
Assistant Attorney General.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

Received and Filed T.C.U.S., April 21, 1950.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Mrs. Madge Nielson,
1620 Cowper Street,
Palo Alto, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of April, 1950, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 21st day of April, 1950.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 25th day of April, 1950.

/s/ MADGE NIELSON,
Respondent on Review.

Received and Filed, T.C.U.S., May 5, 1950.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Harry R. Horrow, Esquire,
225 Bush Street,
San Francisco, California:

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of April, 1950, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 21st day of April, 1950.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Coun-
sel for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for re-

view, is hereby acknowledged, this 24th day of April, 1950.

/s/ HARRY R. HORROW,

Counsel for Respondent on
Review.

Received and Filed T.C.U.S., May 5, 1950.

[Title of Court of Appeals and Cause.]

MOTION

Comes Now the Commissioner of Internal Revenue, petitioner on review in the above-entitled causes, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and moves that the time within which to complete and transmit the record on review be extended from May 31, 1950, to and including July 20, 1950, and for cause respectfully represents:

That the question as to whether the petitions for review will be further prosecuted is under consideration and therefore additional time is required in order to complete this consideration and also if necessary to properly stipulate the omissions, if any, from the record on review, to prepare

the record and to transmit it to the Court of Appeals.

Wherefore, it is prayed that this motion be granted.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

J. M. MORAWSKI,
Special Attorney,
Bureau of Internal Revenue.

Received and Filed T.C.U.S., May 24, 1950.

The Tax Court of the United States
Washington

Docket Nos. 21103, 21104

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

SIGVALD NIELSON, MADGE NIELSON,
Respondents.

ORDER ENLARGING TIME

Upon motion of counsel for petitioner, it is

Ordered that the time for preparation, transmission and delivery of the record sur petition for review of the above-entitled proceeding in the United

States Court of Appeals for the Ninth Circuit
is extended to July 20, 1950.

[Seal]: /s/ JOHN W. KERN,
 Presiding Judge.

Dated: Washington, D. C., May 24, 1950.

Served May 26, 1950.

United States Court of Appeals
for the Ninth Circuit

Docket Nos. 21103, 21104

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

SIGVALD NIELSON, MADGE NIELSON,
Respondents on Review.

STATEMENT OF POINTS

Comes Now the petitioner on review herein and
makes this concise statement of points on which he
intends to rely on the review herein, to wit:

The Tax Court of the United States erred:

1. In holding that the income in question, which
was received by Sigvald Nielson as his share of a
certain partnership fee received in 1944, is subject
to tax under the provisions of Section 107, Internal
Revenue Code, on the authority of the Tax Court's
decision in *Elder W. Marshall, et al.*, 14 T.C. No. 12.

2. In failing to uphold the Commissioner's de-

termination that the income in question was taxable as ordinary income in the year received, without the benefits of the relief provided by Section 107, Internal Revenue Code, since Sigvald Nielson's membership in the partnership was less than 36 calendar months.

3. In holding that there are overpayments in income tax for the year 1944 in the amount of \$405.74 in the case of Sigvald Nielson and \$450.45 in the case of Madge Nielson; and in failing to uphold the deficiencies determined by the Commissioner in the amount of \$405.74 in the case of Sigvald Nielson and \$450.45 in the case of Madge Nielson.

4. In that its decisions are not supported by the evidence.

5. In that its decisions are contrary to law and regulations.

/s/ THERON L. CAUDLE,
Assistant Attorney General.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

Service of a copy of the within statement of points is hereby admitted this 7th day of June, 1950.

/s/ HARRY R. HORROW,
Attorney for Respondents on Review.

Received and Filed T.C.U.S., July 3, 1950.

[Title of Court of Appeals and Cause.]

STATEMENT RE DIMINUTION OF RECORD

To the Clerk of The Tax Court of the United States:

Pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure adopted by the United States Court of Appeals for the Ninth Circuit, you are hereby notified that the petitioner on review will not exclude or omit any part of the record in these proceedings which were consolidated for hearing and opinion by the Tax Court.

/s/ THERON L. CAUDLE,
Assistant Attorney General.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

Service of a copy of this Statement Re Diminution of Record is hereby acknowledged this 7th day of June, 1950.

/s/ HARRY R. HORROW,
Attorney for Respondents on Review.

Received and Filed T.C.U.S., July 3, 1950.

The Tax Court of The United States
Washington

Docket Nos. 21103, 21104

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

SIGVALD NIELSON, MADGE NIELSON,
Respondents on Review.

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 31, inclusive, constitute and are all of the papers and proceedings on file in my office as the original and complete record in the proceedings before The Tax Court of the United States entitled, "Sigvald Nielson, Petitioner, vs. Commissioner of Internal Revenue, Respondent," Docket No. 21103 and "Madge Nielson, Petitioner, vs. Commissioner of Internal Revenue, Respondent," Docket No. 21104, and in which the respondents in The Tax Court proceedings have initiated appeals as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United

States, at Washington, in the District of Columbia, this 7th day of July, 1950.

[Seal]: /s/ VICTOR S. MERSCH,
 Clerk, The Tax Court of the
 United States.

[Endorsed]: No. 12609. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Sigvald Nielson and Madge Nielson, Respondents. Transcript of the Record. Upon Petitions to Review Decisions of The Tax Court of the United States.

Filed July 14, 1950.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12609

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

SIGVALD NIELSON,

Respondent.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner.

vs.

MADGE NIELSON,

Respondent.

NOTICE AS TO STATEMENT OF POINTS TO
BE RELIED UPON AND AS TO PARTS
OF RECORD TO BE PRINTED.

Pursuant to Rule 19(6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, notice is hereby given by the Commissioner of Internal Revenue, petitioner on review herein, as follows:

1. The Commissioner hereby adopts, as the Statement of Points upon which he intends to rely on the present review, the Statement of Points heretofore filed and served and included in the certified typewritten transcript of record filed in this Court in this cause; and

2. The Commissioner hereby designates for

printing the entire transcript of record filed in this Court in this cause.

Dated this 27th day of July, 1950.

/s/ THERON LAMAR CAUDLE,
Assistant Attorney General, Counsel for Petitioner
on Review.

[Endorsed]: Filed July 31, 1950.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO PARTS OF THE RECORD TO BE PRINTED

1. Pursuant to Rule 19(6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, it is hereby stipulated and agreed by and between the parties to this cause, through their respective counsel, that, in lieu of the parts of the record heretofore designated for printing by the Petitioner on Review by his notice dated July 27, 1950, heretofore served and filed in this cause in this Court, only the following parts of the transcript of record filed in this Court in this cause be printed, as material to the consideration of the review:

	Document No.*
(a) Docket Entries in T.C. Docket #21103	1
(b) Docket Entries in T.C. Docket #21104	2
(c) Petition in T.C. Docket #21103	3
(d) Answer in T.C. Docket No. 21103	5
(e) Joint Motion for Consolidation of Proceedings in T.C. Docket Nos. 21103 and 21104	16

* This refers to the number given to the respective parts of the transcript of record on review by the Clerk of the Tax Court in transmitting it to the Clerk of the Court of Appeals.

(f) Stipulation of Facts in T.C. Docket Nos. 21103 and 21104	17
(g) Official Report of Proceedings before the Tax Court	18
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2. It is further agreed that, except for immaterial minor differences, the petition, with Exhibit A thereto, and the answer in the case of Madge Nielson v. Commission, T. C. Docket No. 21104, are identical to those in the case of Sigvald Nielson v. Commissioner, T. C. Docket No. 21103, and it is therefore agreed that they be omitted from the printed record. It is further agreed that Respondent's Exhibit B is a copy of the income tax return of Madge Nielson for the year 1944, and that it, except for immaterial minor differences, is identical to respondent's Exhibit A, the income tax return for that year of Sigvald Nielson, and it is therefore agreed that it be omitted from the printed record.

3. It is further agreed that there also be in-

cluded in the printed record the following documents filed in this Court:

(a) Notice as to Statement of Points, etc., filed by Petitioner on Review.

(b) This Stipulation.

/s/ THERON LAMAR CAUDLE,
Assistant Attorney General, Counsel for Petitioner
on Review.

/s/ JOSEPH L. SELIGMAN, JR.
Counsel for Respondents on
Review.

Dated this 17th day of August, 1950.

[Endorsed]: Filed August 2, 1950.

No. 12609

**In the United States Court of Appeals
for the Ninth Circuit**

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SIGVALD NIELSON AND MADGE NIELSON, RESPONDENTS

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

THERON LAMAR CAUDLE,

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Special Assistants to the Attorney General.

FILED

MAY 10 1950

PAUL P. O'BRIEN,

CLERK

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(I)

In the United States Court of Appeals for the Ninth Circuit

No. 12609

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SIGVALD NIELSON AND MADGE NIELSON, RESPONDENTS

*ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE PETITIONER

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 48-55) are not officially reported.

JURISDICTION

These petitions for review (R. 57-60, 62-65) involve proceedings with respect to deficiencies in income tax determined by the Commissioner against Sigvald Nielson (hereinafter referred to as the taxpayer) for the year 1944 in the amount of \$405.74 (R. 11-16) and against his wife, Madge Nielson, for the same year in the amount of \$450.45 (R. 20, 48). The taxpayer and his wife are individuals residing in Palo Alto, California, and they filed their respective federal income tax returns for the year 1944 with the Collector of Internal Revenue for the First District of California. (R. 20, 49.) By letters dated

November 18, 1948 (R. 11-16), the Commissioner of Internal Revenue notified the taxpayer and his wife, respectively, that the determination of their income tax liability for the year 1944 disclosed deficiencies in the amounts above stated.¹ Within 90 days thereafter, namely, on December 3, 1948, the taxpayer (R. 2) and his wife (R. 4), respectively, filed with the Tax Court petitions (R. 6-16 and see Fn. 1, *infra*) for a redetermination of the deficiencies determined by the Commissioner as above stated, pursuant to Section 272 of the Internal Revenue Code. On January 27, 1950, the Tax Court entered its decisions (R. 55, 56) finding no deficiencies for 1944 as to the taxpayer and his wife, respectively (and, further, finding overpayments, as hereinafter explained). Less than three months thereafter, namely, on April 21, 1950 (R. 3, 5), the Commissioner filed his petitions (R. 57-60, 62-65) for a review by this Court of the decisions of the Tax Court, pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

¹ The printed record in this Court contains only a copy of the deficiency letter addressed to the taxpayer (R. 11-16), which was attached as Exhibit A to his petition to the Tax Court (Docket No. 21103, R. 6-10). The letter addressed to the wife, which was attached as Exhibit A to her petition to the Tax Court (Docket No. 21104), as well as her petition and the Commissioner's answer, and also the copy of her income tax return for 1944, have been omitted from the printed record by stipulation of the parties, in which it was agreed (R. 76) that, except for immaterial minor differences, they are identical to the corresponding documents in the case of the taxpayer.

QUESTION PRESENTED

The question presented is whether an incoming partner may avail himself of Section 107 (a) of the Internal Revenue Code with respect to his share of a fee received by a partnership for services performed over a period exceeding 36 months, if he has not been a member of the partnership for 36 months or more at the time of its receipt.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 107 [as added by Section 220 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and amended by Section 139 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF THIRTY-SIX MONTHS OR MORE.

(a) Personal Services.—If at least 80 per centum of the total compensation for personal services covering a period of thirty-six calendar months or more (from the beginning to the completion of such services) is received or accrued in one taxable year by an individual or a partnership, the tax attributable to any part thereof which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income of such individual ratably over that part of the period which precedes the date of such receipt or accrual.

*

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(26 U. S. C. 1946 ed., Sec. 107.)

By Section 119 of the Revenue Act of 1943, c. 63, 58 Stat. 21, the words "AND BACK PAY" were added to the title of Section 107 of the Code, and subsection (d)—containing provisions dealing with "back pay," not here material—was added to Section 107.

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.107-1. *Personal Services.*—

* * * * *

It is not necessary, in order for section 107 (a) to be applicable, that the individual who includes in his gross income compensation for such personal services be the person who renders the services. For example, a partner who shares in the compensation for such personal services rendered by the partnership may be entitled to the benefits of section 107 (a), notwithstanding that he took no part in the rendering of such services.

* * * * *

STATEMENT

The facts in these cases, which were stipulated (R. 20-25)² and were found by the Tax Court to be as stipulated (R. 49), were recited by the Tax Court in its memorandum opinion as follows (R. 49-52):

² In addition to the stipulation of facts, there were two exhibits adduced in evidence at the hearing before the Tax Court, Exhibit A, consisting of a copy of the taxpayer's income tax return for the year 1944 (R. 34-46), and Exhibit B, a copy of his wife's return for that year (R. 47 and see fn. 1, *supra*).

The taxpayer and his wife have resided in California since their marriage in 1924, to and including the taxable year 1944. Each filed a separate return for 1944 with the Collector for the first district of California. The returns were made on the cash basis. (R. 49.)

The taxpayer is a lawyer. He became associated with a law partnership in San Francisco in November 1935, as an employee of the firm; and ever since that time, he has been associated with the same firm. (R. 49.)

On May 1, 1942, the taxpayer was admitted into the partnership, and he became entitled to receive, thereafter, a distributive share, each year, of the net profits of the partnership. (R. 49.)

From the date of his employment by the firm to January 1, 1939, the taxpayer received a fixed salary as compensation for his services. Thereafter, until May 1, 1942, he received during each calendar year, in addition to a fixed salary, a fixed percentage of the net profits of the partnership, as follows: 0.463 per cent, in 1939; 0.526 per cent, in 1940; 0.631 per cent, in 1941; and 0.631 per cent, from January 1 to April 30, 1942. (R. 49-50.)

After May 1, 1942, when the taxpayer became a member of the partnership, the distributive shares of the net profits thereof to which he was entitled, and which he received, were as follows: 2.314 per cent, from May 1 to December 31, 1942; 4.573 per cent, 1943; 3.5 per cent, from January 1 to April 30, 1944; and 5.766 per cent, from May 1 to December 31, 1944. (R. 50.)

From August 4, 1935, up to and including May 1943, a period of 94 months, the partnership rendered legal services to The Equitable Life Assurance Society of the United States, hereinafter referred to as "Equitable," in connection with litigation growing out of the imposition by the State of California of a tax on gross premiums from insurance and annuities. Those services were entirely distinct and separate from other legal services then being rendered to Equitable by the partnership and after the completion of these special services, the partnership received from Equitable \$43,425 as compensation for them. That compensation was received in a lump sum in December 1944, and no other compensation was ever received by the partnership from Equitable for those services. (R. 50.)

For many years past and during all of the years material herein, all fees received for legal services by the partnership have been pooled in a single fund, which has been first used to pay all expenses. The balance, representing the net profits of the partnership, has been distributed periodically among all of the partners and all of the employees entitled to share therein. The amount of the distributions has been computed on the basis of a quarterly allocation to the profit-sharing employees, and a calendar year allocation to the partners, of the profits of the partnership, all in accordance with the percentage shares agreed upon by the partners and in effect during the period in which the net profits were received. Each partner and profit-sharing employee has shared in the division of all profits received during any period in

which he has been entitled to a share of the partnership profits according to the agreement of the partners; conversely, when a partner or employee has ceased to be such by death or retirement or otherwise, he has not shared in any profit or profits received after the month in which the cessation has occurred. (R. 50-51.)

At all times material herein, the partnership kept its books of account and filed its income tax returns on a calendar year and cash receipts and disbursements basis. (R. 51.)

Sigvald Nielson's distributive share of the partnership's net income for the year 1944 included his distributive share in the Equitable fee in the amount of \$2,504.16. One-half of that distributive share, or \$1,252.08, was the community income of Sigvald Nielson and the other one-half was the community income of his wife, Madge Nielson. (R. 51.)

In their federal income tax returns for 1944, the taxpayer and his wife each claimed the benefits of Section 107 (a) of the Internal Revenue Code and reported therein the additional income taxes attributable to their respective shares of the compensation from Equitable, had such shares been included in their gross income ratably over the preceding period of 94 months from August, 1935, to May, 1943, during which the services were rendered by the partnership. (R. 52.)

The Commissioner disallowed their claims for the benefit of Section 107 (a) of the Internal Revenue Code because the taxpayer had not been a member of the partnership for a period of 36 months, the Com-

missioner holding that, therefore, the taxpayer did not qualify for relief under the provisions of Section 107 (a). (R. 14-15, 52.)

The Tax Court, by a memorandum opinion by Judge Harron (R. 48-55), decided in favor of the taxpayer and his wife, and accordingly entered its decisions that there are no deficiencies in income tax for the year 1944 as to them (R. 55, 56).³ The present reviews followed.

STATEMENT OF POINTS TO BE URGED

On the present reviews, the Commissioner urges and relies upon all of the points originally stated and set out by him (R. 69-70) and subsequently adopted by him in this Court (R. 74) as the points upon which he intends to rely. For present purposes, they may be briefly stated as follows: (1) The Tax Court erred in holding that the taxpayer's share of the partnership fee in question is subject to tax under the provision of Section 107 of the Internal Revenue Code; and (2) the Tax Court erred in failing to uphold the Commissioner's determination that the income in question was taxable as ordinary income in the year received, without the benefit of Section 107 of the Internal Revenue Code, since the taxpayer's membership in the partnership was less than 36 months.

³ Further, since subsequent to the filing of the petitions with the Tax Court the deficiencies in question had been paid, in order to stop the running of interest, the Tax Court also found overpayments as to the taxpayer and his wife in the amount of the tax and interest respectively paid by each. (R. 24-25, 52-53, 55-56.)

ARGUMENT

The question in this case is identical to that presented in *Commissioner v. Enersen*, now pending before this Court on review as Cause No. 12,610. In deciding that case in favor of the taxpayer, the Tax Court followed, as it did in the instant case (R. 54-55), the holding of the majority of the Tax Court in *Marshall v. Commissioner*, 14 T. C. 90, now pending on review in the Third Circuit. Since in the brief filed in this Court on behalf of the Commissioner in the *Enersen* case we have already set forth our argument upon this question, including our comments upon the holding of the Tax Court majority in the *Marshall* case, we deem it unnecessary to burden the Court with a repetition here: we therefore adopt in this case and incorporate herein by reference all of the argument advanced in our brief in the *Enersen* case, and respectfully request that it be considered in this case.

The taxpayer in the *Enersen* case, as the taxpayer here, seeks the benefit of Section 107 (a) of the Internal Revenue Code with respect to his share of certain fees for long-term services received by a partnership during the taxable years at a time when he had been a member of the partnership for less than 36 months. Prior to being admitted to membership in the partnership, the taxpayer in the *Enersen* case, just as the taxpayer here, had previously been an employee of the partnership, first at a flat salary and subsequently upon the basis of a guaranteed minimum salary plus a percentage of profits. There are no material differences between the facts of this case and those of the *Enersen* case. That the record in the

Enersen case contains copies of the agreements in force during the profit-sharing period of employment, while the record in this case does not, is of no significance: the record in this case sufficiently establishes the status of the taxpayer during his profit-sharing period of employment as being that of an employee (and not a partner) who was being *currently* paid for his services. (R. 21, 49-50.)

CONCLUSION

It is submitted that the decisions of the Tax Court in these cases should be reversed, and the determinations of the Commissioner reinstated.

Respectfully submitted,

THERON LAMAR CAUDLE,
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ELLIS N. SLACK,
HARRY MARSELLI,

Special Assistants to the Attorney General.

NOVEMBER 1950.

No. 12,609

IN THE

United States Court of Appeals
For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

VS.

SIGVALD NIELSON and MADGE NIELSON,

Respondents.

On Petition for Review of the Decisions of
The Tax Court of the United States.

BRIEF FOR THE RESPONDENTS.

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Respondents.

On Petition for Review of the Decisions of
The Tax Court of the United States.

BRIEF FOR THE RESPONDENTS.

PRELIMINARY STATEMENT.

These cases are presented on petitions filed by the Commissioner of Internal Revenue for review of decisions of the Tax Court of the United States. The taxpayers are husband and wife who included in their gross income for the year 1944 their shares of a fee received in that year by the law partnership of which the husband was a partner. This fee covered compensation paid in a lump sum for legal services performed by the partnership for a period from August 1, 1935, to May, 1943. Section 107(a) of the Internal Revenue Code provides a special tax treatment of compensation from personal services rendered over a period of thirty-six months or more.

The sole question is whether the taxpayers are entitled to the benefits of section 107(a) of the Internal Revenue Code in computing their income tax for the taxable year 1944 with respect to their shares of said fee.

There is no dispute as to the computation of the tax liability or the allocation of the income over the years in which the services were rendered, if the taxpayers are eligible to receive the benefits of that section. It is also not disputed that the income in question is community income and that the wife is entitled to the benefits of section 107(a) for her portion of the fee involved, which represents her share of the community income if said section applies to her husband. The Commissioner's contention that the taxpayer and his wife are not entitled to the benefits of section 107(a) was rejected by the Tax Court in its memorandum findings of fact and opinion (R. 48).

Inasmuch as the cases with respect to the tax liability of the taxpayers involve the same issue and same material facts that were considered by the Tax Court, the petitions for review are presented to this court on a single record. The question is identical to that presented in *Commissioner v. Enersen*, now pending before this Court on review in Docket No. 12610. The Commissioner's argument adopts in this case and incorporates by reference all of the argument advanced in the Commissioner's brief in the *Enersen* case. Accordingly taxpayers' brief will be addressed to the petitioner's brief filed in the *Enersen* case.¹

¹All references herein to petitioner's brief, unless otherwise designated, will refer to the brief filed by the Commissioner in the case of *Commissioner v. Enersen*, Docket No. 12610.

JURISDICTION.

The jurisdictional statements in the petitioner's brief in this case (p. 1) are accepted.

QUESTION PRESENTED.

The question presented is whether a partner and his wife are entitled to the benefits of section 107(a) of the Internal Revenue Code with respect to the portion of a fee included in their gross income, such fee representing compensation for personal services performed by the partnership for a period exceeding thirty-six months, even though the husband had not been a partner for thirty-six months or more at the time of the receipt of said income by the partnership.

STATUTES AND REGULATIONS INVOLVED.

The issue arises under section 107(a) of the Internal Revenue Code as amended by section 139 of the Revenue Act of 1942, c. 619, 56 Stat. 798, the provisions of which are as follows:

“(a) **PERSONAL SERVICES.**—If at least 80 per centum of the total compensation for personal services covering a period of thirty-six calendar months or more (from the beginning to the completion of such services) is received or accrued in one taxable year by an individual or a partnership, the tax attributable to any part thereof which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income

of such individual ratably over that part of the period which precedes the date of such receipt or accrual.”

For the convenience of the Court there is attached in the appendix for comparison purposes the provisions of this section as it read prior to its amendment by the Revenue Act of 1942. The pertinent provisions of the regulations are as follows (Regs. 111, sec. 29.107-1):

“It is not necessary, in order for section 107(a) to be applicable, that the individual who includes in his gross income compensation for such personal services be the person who renders the services. For example, a partner who shares in the compensation for such personal services rendered by the partnership may be entitled to the benefits of section 107(a), notwithstanding that he took no part in the rendering of such services.”

STATEMENT OF FACTS.

All of the facts were stipulated and were found by the Tax Court to be as stipulated (R. 49). The facts are fully and adequately stated by the Commissioner in his brief. Summarized briefly they are as follows:

During the year 1944 respondent Sigvald Nielson (hereinafter referred to as “taxpayer”) and his wife included in their gross income their respective shares of a fee received in a lump sum by the law partnership of which taxpayer was a member. Said fee represented compensation for legal services rendered by the partnership from August 1, 1935, to May, 1943. The taxpayer was a partner of said partnership throughout the entire

year 1944. During the period in which said services were rendered by the partnership the taxpayer, from 1935 to January, 1939, was employed by the partnership on a fixed salary, and thereafter, until he became a partner on May 1, 1942, was employed on a fixed salary plus a stated percentage of the net profits of the partnership for each year. The Commissioner has allowed the benefits of section 107(a) to all of the partners of said partnership who had been partners for more than thirty-six months prior to the receipt of said fee (R. 24). The benefits of section 107(a) were denied to taxpayer and his wife by the Commissioner for the sole reason that taxpayer had not been a member of the partnership for a period of thirty-six months or more prior to the receipt of the fee here involved.

The Tax Court held that the taxpayer and his wife were entitled to the benefits of section 107(a) in respect to their shares of said fee (R. 48-55).

SUMMARY OF ARGUMENT.

As originally enacted in 1939 section 107 of the Internal Revenue Code applied only to an individual who rendered personal services in an individual capacity or as a member of a partnership for a period of five calendar years or more. Said section was amended by section 139 of the Revenue Act of 1942, and as amended is applicable to the taxable year in question. Among other changes, the amendment expressly eliminated the requirement of personal services in order for an individual to qualify for the benefits of section 107. Section 107(a) in

its amended form expressly made eligible to receive its benefits *any* individual required to include in his gross income compensation received for personal services performed over a period of thirty-six months or more, where at least 80 per cent of such total compensation was received in one taxable year. The taxpayer and his wife were clearly required to include in their gross income for 1944 their shares of the fee for which they are claiming the benefits of section 107(a). The Commissioner in attempting to deny them the benefits of said section relies on the decision of this Court in *Lindstrom v. Commissioner of Internal Revenue* (9 Cir. 1945) 149 F.2d 344. This case arose under section 107 as originally enacted, and the law was expressly amended in 1942 to eliminate the basis upon which this decision rests. This decision applies the requirement that existed in the prior law that the person receiving the benefits of section 107 must be an individual who actually performed the personal services giving rise to the long-term compensation for the prescribed period.

The legislative history of the amendment of section 107 clearly reveals the intent of Congress to make the benefits of section 107(a) available to any individual required to include in his gross income long-term compensation.

The theory upon which the deficiencies herein have been determined is that no person is entitled to receive the benefits of section 107(a) unless his right to receive the income for which such benefits are claimed existed for thirty-six months or more. Even if this theory is accepted, the facts in these cases show that the taxpayer and his wife for more than thirty-six months had the right to receive a share of the fee in question, either as a part-

ner or as a profit-sharing employee. Congress in general language expressly made the benefits of section 107(a) available to any individual required to include in his gross income long-term compensation. The taxpayer and his wife under the express terms of the statute are therefore entitled to receive the benefits of section 107(a) as the court below correctly held.

ARGUMENT.

I.

SECTION 107(a) AS AMENDED EXPRESSLY APPLIES TO ANY INDIVIDUAL INCLUDING IN HIS GROSS INCOME ANY PART OF COMPENSATION FOR PERSONAL SERVICES COVERING A PERIOD OF THIRTY-SIX CALENDAR MONTHS OR MORE.

Ordinarily a member of a partnership must include in his income all of his distributive share of the partnership income for the taxable year and compute his tax upon all of his taxable income in said year. An exception to this general rule was provided by section 107 of the Internal Revenue Code, which was added by section 220 of the Revenue Act of 1939, c. 247, 53 Stat. 862, 878. Said section was amended by section 139 of the Revenue Act of 1942, and the section as so amended is admittedly applicable to the taxable year in question, 1944. In enacting this section Congress was aware of the hardship of including in income in one year amounts representing compensation for personal services rendered over a long period of time. It therefore provided in section 107(a) that the tax on such income should be not greater than the aggregate amount of tax that would have been paid

had the income been received monthly over the period during which the services were rendered. There are three elements involved in the application of section 107(a) as amended. Said section first defines the income to which the section applies, which for convenience is referred to herein as "long-term compensation;" secondly, said section identifies the taxpayers to whom the benefits of the section are available, and, thirdly, it prescribes the measure of relief accorded in computing the tax on the long-term compensation.

In these cases there is no controversy with respect to the first point. The stipulated facts show that the fee in question represented compensation for personal services received by a partnership in a lump sum upon completion of services extending over a period of thirty-six months or more (Pet. Br. p. 11).

There is likewise no dispute as to the method of computing the tax benefits available to taxpayer and his wife in the event section 107(a) is applicable to them (R. 23-24).

Accordingly, the question here presented is narrowed to an interpretation of the clause which identifies the individuals who are entitled to the benefits of the section. In simple and clear language it grants the tax relief to "any individual" in whose gross income is included any part of long-term compensation. The statute may be simply paraphrased as follows: If any long-term compensation is included in the gross income of any individual, such individual is entitled to the statutory relief. Since it is admitted that long-term compensation was included in the gross income of taxpayer and his wife for 1944, it

follows that each of them is entitled to the statutory relief offered under section 107(a).

The Tax Court's decision in this case relied on its decision in the case of *Elder W. Marshall*, 14 T.C. 90, now pending before the Court of Appeals for the Third Circuit on petition for review by the Commissioner. The Commissioner likewise urged in that case that section 107(a) was not applicable to a taxpayer who was not a partner for more than thirty-six months. The Tax Court rejected this contention, stating as follows (pp. 94-95):

“Since it is the status of the recipient of the income in the year of receipt, and not either his status in prior years, *Federico Stallforth*, 6 T.C. 140, or the identity of the individual who contributed the services that is made to govern the application of section 107 in its present form, we are satisfied that under the facts of this proceeding petitioner correctly computed his tax by use of its provisions.”

Section 107(a) in crystal-clear language refers to “any individual” who includes in gross income long-term compensation. It applies to individuals who are members of a partnership as well as those who are not. It applies equally to the spouse of a partner in a community property state who is required to include long-term compensation in her gross income as her share of the community income, as well as to her husband. There is no room for construction. Congress in precise terms identified the individuals entitled to the benefits of section 107(a) as those who include long-term compensation in their gross income. There is no language in section 107(a) restricting its application to individuals who were members of a partnership for more than thirty-six months prior to

the receipt of long-term compensation. The decision of the court below that section 107(a) is applicable to the taxpayer and his wife rests on the express provisions of the statute.

II.

THE LEGISLATIVE HISTORY OF SECTION 107(a) ESTABLISHES AFFIRMATIVELY THAT CONGRESS DID NOT INTEND TO APPLY THE RESTRICTION WHICH THE COMMISSIONER SEEKS TO IMPOSE.

Prior to the amendment of section 107 by the Revenue Act of 1942, and as originally enacted, the section applied only to individuals actually rendering the personal services for which the compensation was received. The provisions of section 107 in their original form were considered by this court in the case of *Lindstrom v. Commissioner of Internal Revenue* (9 Cir. 1945) 149 F.2d 344. In that case the taxpayer was a member of a law partnership which received a fee for legal services rendered by the partnership and by the taxpayer's partner prior to the formation of the partnership. The taxpayer attempted to add to the period during which services were rendered by him in his capacity as a member of the partnership the time during which services were rendered by his partner prior to the existence of the partnership, in order to meet the requirements of section 107. This court correctly held that the taxpayer was not entitled to the benefits of section 107 as it then read, for the reason that he had not personally rendered services for the prescribed period. The court was aware of the amendment of section 107 by the Revenue Act of 1942 and seemingly felt

that a different result would have been required by that section as amended, for it pointed out specifically in its opinion (p. 346) :

“The subsequent amendment of this section by Section 139 of the Revenue Act of 1942 does not apply as it relates only to taxable years beginning *after* December 31, 1940.”

There is no question here of any “tacking on” to the period of membership in the partnership the period during which the services were rendered by the partnership, as petitioner states in his brief (Pet. Br. p. 12). Section 107 in its original form was confined to individuals who actually rendered personal services giving rise to the long-term compensation. Congress specifically changed the provisions of section 107 relating to the persons entitled to claim its benefits. It specifically provided by its amendment of section 107 contained in the Revenue Act of 1942 that its benefits would be available to any individual who included long-term compensation in his gross income.

Petitioner’s reliance on the *Lindstrom* case, *supra*, is therefore completely unfounded, since the language on which the decision rests was specifically amended. That the result reached in the *Lindstrom* case was no longer intended to be applicable is made clear from the Senate Committee Report on amendment to section 107 (S. Rep. 1631, 77th Cong. 2d Sess., p. 109 (C.B. 1942-2, 585, 586)) :

“As revised by your committee, section 107(a) provides that, with respect to taxable years beginning after December 31, 1941, if at least 80 per cent of the total compensation for personal services covering a period of 36 calendar months or more (from the

beginning to the completion of such services) is received or accrued in one taxable year by an individual or a partnership, then the tax attributable to any part of the amount received or accrued in such year, which is included in the gross income of *any individual*, shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income of such individual ratably over that part of the period of the services which precedes the date of such receipt or accrual. * * *

In order for section 107(a) to be applicable, *it is not necessary that the individual* who includes in his gross income compensation for such personal services *be the person who renders such services*. For example, a partner who shares in compensation for such personal services rendered by the partnership may be entitled to the benefits of section 107(a), notwithstanding that he took no part in the rendering of such services. Likewise, in community property States, the spouse of a person who renders such personal services may be entitled to the benefits of section 107(a))" (italics supplied).

Prior to the enactment of this amendment there was no requirement as to period of membership in a partnership for eligibility to the benefits of section 107. Eligibility was then limited to persons who performed personal services giving rise to the long-term compensation, whether in their individual capacity, or as members of a partnership, or both. By its amendment, as shown in the Committee Report, Congress clearly evidenced its intent to eliminate from the statute the requirement that personal services giving rise to the long-term compensation had to be rendered by the taxpayer entitled to the

benefits of section 107(a). Congress instead made the benefits available to any individual required to include in gross income such long-term compensation. The court below aptly summarized the effect of this change in its opinion in the *Marshall* case (pp. 92-93):

“The parties are in apparent agreement that prior to the 1942 amendment respondent’s position was the only tenable one. It was in fact so held. *Ralph G. Lindstrom*, 3 T.C. 686. But there the court took pains to point out on affirmance, *Lindstrom v. Commissioner* (C.C.A., 9th Cir.), 149 Fed. (2d) 344, 346, that:

‘ * * * The subsequent amendment of this section by Section 139 of the Revenue Act of 1942 does not apply as it relates only to taxable years beginning after December 31, 1940.’

A comparison of the language of the section before and after the amendment demonstrates, however, that emphasis was reversed by the new provision and was removed from the person who renders the services to the person who is required to report the income.”

The petitioner does not deny that Congress intended to eliminate the requirement that a member of a partnership claiming the benefits of section 107(a) must establish that he personally performed or participated in the services giving rise to the long-term compensation (Pet. Br. p. 19). However, petitioner asserts that in eliminating this period of service requirement, Congress intended to require a period of membership in a partnership for eligibility to the benefits of section 107. This ignores the clear provision in the statute that the benefits are accorded to any individual who includes in his gross income long-term compensation. Petitioner can not point to any language in section 107(a) which prescribes a period of

membership in a partnership as a prerequisite to eligibility to its benefits. Petitioner does not attempt to do so. He merely relies on statements as to the "basic purpose" of section 107 and abstracts from the Committee report dealing with section 107 as it was originally enacted a statement that the basic purpose of said section was to grant relief to persons "who work for long periods of time without pay." The assertion is made by petitioner that Congress in amending the law in 1942 intended in no way to depart from that basic purpose (Pet. Br. p. 20).

These contentions are made in the face of the admitted purpose of Congress in changing the law in 1942 to grant relief to persons who performed no services whatever giving rise to the long-term compensation. Petitioner specifically states that the requirement of personal service was expressly eliminated by the 1942 amendment in identifying the persons entitled to the benefits of section 107(a). Congress did then enlarge its original basic purpose. Congress preserved its purpose of relieving taxpayers from hardship resulting from the inclusion in their income of long-term compensation but made the relief available to any individual. The hardship that Congress was dealing with was the bunching up of income in the year of receipt of long-term compensation. Congress recognized that the hardship accrued to all persons including such bunched up income in their returns. The hardship attaches not to the individual who performs the service but to the person who is liable for the tax on such income. In order to alleviate the hardship uniformly and equitably, relief was made available to any individual who must include long-term compensation in his gross income. This is clearly revealed

by comparing the taxpayer's position with the position of other members of the firm who have been accorded the benefits of section 107(a), whether or not they performed personal services in earning the long-term compensation involved herein (R. 24). Such partners have been accorded the benefits of section 107(a) merely because they were members of the partnership for more than thirty-six months prior to the receipt of the income in question. Petitioner's assertion that the relief must be denied to taxpayer because he was not a person working for "long periods of time without pay" (Pet. Br. p. 21) will not bear analysis in the face of his admitted allowance of relief to other partners who had not rendered personal services in earning the fee in question. It is clear that taxpayer and his wife are equally entitled to the benefits of section 107(a) for they, like the other members of the partnership, were required to include a part of the fee in their gross income.

Petitioner states that the taxpayer's position may be within "a permissible interpretation" of the language of the statute as amended, but that it is not within the intent expressed by Congress, and that to sustain it would lead to "absurd and unreasonable consequences" (Pet. Br. pp. 25-26). More to the point is the fact that petitioner's position is *not* within a permissible interpretation of the language of the statute. It can not be said that the equal treatment of all members of a partnership with respect to their distributive shares of long-term compensation of the partnership would lead to absurd and unreasonable consequences. Equal treatment is the rule for all other items of income, deductions or credits of a partnership (I.R.C., sec. 181-190). There is nothing

anomalous or absurd about a plainly expressed intention on the part of Congress to provide that long-term compensation of a partnership shall be treated as such for all members of the partnership alike who are required to include any part of it in their gross income.

The extreme case suggested by petitioner (Pet. Br. p. 26) is not before this court. The taxpayer was associated with the partnership throughout the period in which the personal services covering the fee in question were rendered. As the Tax Court said in *Elder W. Marshall*, 14 T.C. 90, 94:

“ * * * the generality of the statutory language justifies the conclusion that it was not the legislative purpose to draw narrow distinctions among the infinite possible factual variations which this very record thus exemplifies.”

There is no need to confuse the narrow issue presented by any general discussion of the status of a partnership for tax purposes (Pet. Br. pp. 26-27). The application of section 107(a) does not rest on any theory of attribution of partnership services to the taxpayer for the purposes of section 107(a). The application of that section, as its legislative history and its language clearly demonstrate, relates to any individual in whose gross income long-term compensation is included. The taxpayer and his wife are clearly such individuals and are entitled to the benefits of said section.

III.

EVEN IF THE THEORY APPLIED BY THE COMMISSIONER IN DETERMINING THE DEFICIENCIES IS CORRECT, THE TAXPAYER AND HIS WIFE, NEVERTHELESS, ARE ENTITLED TO THE BENEFITS OF SECTION 107(a).

The Commissioner's position that the taxpayer and his wife are not entitled to the benefits of section 107(a) because his membership in the firm did not exist for more than thirty-six months is expressed in a ruling promulgated in 1948 (G.C.M. 25795, C.B. 1948-2, 61).²

The statement that no taxpayer may qualify for the benefits of section 107(a) who did not render the personal services over a period of thirty-six months or more is directly contrary to the Commissioner's own regulations.

²The ruling concludes as follows (p. 63):

"In view of the foregoing, it is the opinion of this office that the Lindstrom decision applies to cases involving taxable years beginning after December 31, 1940. As special tax exemption provisions of the Internal Revenue Code must be strictly construed, this means that no taxpayer, as an individual or a partner, may qualify for the benefits of section 107(a) who did not render the personal services in question over a period of 36 months or more. In recognition of how partnerships operate, this rule has been qualified with regard to partners to permit them to secure section 107(a) benefits even though they have not personally rendered the services for which the income is received. (See section 29.107-1, Regulations 111, *supra*.) Pursuant to the Lindstrom decision, partners may use only their own terms of membership in a partnership or predecessor firms (working on the same project for 36 months or more prior to the receipt or accrual of the fee in question) for the purpose of securing section 107(a) benefits. Where a partner's terms of membership equal 36 months or more in such a case, he meets the test of section 107(a) for individuals, as modified for partners, and is entitled to tax relief."

Such rulings do not have the force and effect of regulations (see cautionary notice on p. I, C.B. 1948-2).

The deficiency notices herein (R. 11, 15) state:

“In order to qualify for relief under section 107(a) *supra*, your right to receive income for prior services must exist for a period of 36 months or more.”

Even if this theory is accepted, under the facts in these cases it is clear that the taxpayer and his wife did have the right to receive income from the services resulting in the fee in question for a period of thirty-six months or more. The taxpayer and his wife were entitled to share in the net profits of the partnership long prior to the time taxpayer became a member of the firm. Had the fee in question been received at any time during the thirty-six-month period prior to its actual receipt, the taxpayer and his wife would have shared in such fee.

Apparently aware that the basis for the determination of the deficiencies herein does not exist under the facts in these cases, petitioner in his argument seeks to avoid the effect of this statement by asserting that prior to the taxpayer's admission to the firm, he was not in any sense a partner and acquired no proprietary right to fees accruing to the partnership but not collected (Pet. Br. p. 23). The reference to a proprietary right to income is nothing more than a restatement of petitioner's contention that the taxpayer must be a partner for a period of thirty-six months or more. Petitioner seeks to deny the effect of the express amendment to section 107 by the Revenue Act of 1942, which extended relief to any individual reporting long-term compensation in his gross income, and insists upon a requirement that did not exist prior to said amendment. Petitioner would restrict the benefits of section 107(a) to persons who are mem-

bers of a partnership for more than thirty-six months when, prior to the amendment of said section, a person was entitled to its benefits whether or not he was a partner for such period, so long as he performed services, either in his individual capacity or as a member of a partnership, or both, for the prescribed period. The Committee Report on the amendment to section 107 shows clearly that Congress intended to remove inequitable limitations and existing restrictions on the application of the relief provision contained in section 107 (Com. Rep., *supra*). Congress, as shown by the general language it used—"any individual"—did not intend to restrict the class of persons therefore eligible to section 107(a) relief.

Petitioner asserts that, until taxpayer was admitted to the partnership, he was being compensated currently for his services and therefore was not a person who worked "for long periods of time without pay" and who then received his compensation all at one time (Pet. Br. p. 22). Even if it be assumed that the benefits of the section are confined to persons who perform services for a long period of time and then receive compensation all at once, there is no essential difference between the taxpayer while he was on a profit-sharing basis and the persons who were members of the firm at that time. In both cases the taxpayer and the members of the firm were receiving their respective shares of the net profits of the partnership. Any compensation for personal services then being rendered by the partnership giving rise to fees being earned but not received was not reflected in the net profits in which the taxpayer and the partners shared. It must equally be said that the members of the partnership were likewise

fully compensated for their services in each particular year as petitioner asserts was true with respect to the taxpayer.

Section 107 was designed to provide relief on the basis of what would have been taxed to the recipient of income had such income been received by him as the services giving rise to the income were performed. In this respect the taxpayer is in exactly the same position as the members of the firm to whom the benefits of section 107(a) have been accorded, even though they performed no personal service giving rise to the fee in question. Section 107(a) was designed to relieve the hardship resulting from the fact that long-term compensation would not be taxed while the services were being rendered. Such hardship accrues to taxpayer and his wife in respect to the fee in question.

Since the taxpayer and his wife had a right to receive income from said fee if it had been received during the period taxpayer was a profit-sharing employee, even if this Court should accept the theory set forth in the deficiency notices herein, they are entitled to the benefits of section 107(a).

CONCLUSION.

For each of the foregoing reasons we respectfully submit that the decisions of the Tax Court in these cases are correct and should be affirmed.

Dated, San Francisco, California,
December 8, 1950.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

As originally enacted in 1939, Section 107 reads as follows:

“SEC. 107. COMPENSATION FOR SERVICES RENDERED FOR
A PERIOD OF FIVE YEARS OR MORE.

In the case of compensation (a) received, for *personal services rendered by an individual* in his individual capacity, or as a member of a partnership, and covering a period of five calendar years or more from the beginning to the completion of such services, (b) paid (or not less than 95 per centum of which is paid) only on completion of such services, and (c) required to be included in gross income of *such individual*, for any taxable year beginning after December 31, 1938, the tax attributable to such compensation shall not be greater than the aggregate of the taxes attributable to such compensation had it been received in equal portions in each of the years included in such period” (italics supplied).

With only such rearrangement of the order of the clauses of the original statute quoted above as is necessary to facilitate its direct comparison with section 107(a) as amended in 1942 we submit the following:

**Section 107 as originally
enacted in 1939**

1. If not less than 95 per centum
of
2. compensation received for
personal services
3. rendered by an individual in
his individual capacity or
as a member of a partner-
ship and
4. covering a period of 5 cal-
endar years or more from
the beginning to the com-
pletion of such services
5. is paid only on completion
of such services
6. and required to be included
in gross income of *such*
individual
7. the tax benefits are available.

**Section 107(a) as
amended in 1942**

- If at least 80 per centum of
- the total compensation for per-
sonal services
- * * * * *
- covering a period of 36 calen-
dar months or more (from the
beginning to the completion
of such services)
- is received or accrued in one
taxable year by an individ-
ual of a partnership and
- any part thereof is included in
the gross income of *any* in-
dividual
- the tax benefits are available.



